89-159

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HERBERT H. JOHNSON, JR.,

Petitioner,

v.

PARK SHORE MARINA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Assuming that a danger of serious injury from diving off a recreational lake dock into shallow water would be obvious, does the fact that the danger is obvious necessarily preclude, as a matter of law, any duty to warn dock users of that danger under Michigan products-liability law?

2. Is the failure to warn of an unreasonable diving danger in itself a defect of the dock for purposes of Michigan products-liability law?

3. Is the duty to warn of a lake dock's danger to divers a question of fact for the jury or of law for the court, where a material question has been raised as to the reasonableness and foreseeability of the risk of severe injury posed by the dock to recreational divers?

LIST OF PARTIES

Plaintiff-Petitioner

Herbert H. Johnson, Jr.

Defendants-Respondents

Park Shore Marina
John L. Landow, d/b/a Park Shore Marina
Steven M. Palatinas, d/b/a Park Shore Marina
Lake Shore Products, Inc.

Parties *Not* Considered Respondents:

Third-Party Defendants

Arthur D. Anderson
Joanne Anderson
Gerald F. O'Connor
Catherine M. O'Connor

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OPINION BELOW

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's order granting summary judgment in favor of defendants-respondents.

JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this appeal on an order granting writ of certiorari pursuant to 28 U.S. Code sec. 1254(1) (1982).

STATUTE INVOLVED

Revised Judicature Act
Mich. Comp. Laws Ann. sec. 600.2945

Products liability action; definition

Sec. 2945. As used in sections 2946 to 2949 and section 5805, "products liability action" means an action based on any legal or equitable theory of liability brought for or on account of death or injury to person or property caused by or resulting from the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling of a product or a component of a product.

STATEMENT OF THE CASE

The plaintiff-petitioner, Herbert H. Johnson Jr., appeals from a summary judgment in favor of manufacturers, sellers and installers of a recreational lake dock, from which Mr. Johnson dived into shallow water in June 1985. When he struck the lake bottom, Mr. Johnson sustained a spinal cord injury resulting in quadriplegia. Mr. Johnson asserted that defendants had a duty under Michigan law to provide warnings of the diving danger related to the dock's location in the lake, and that their failure to warn exposed him to unreasonable risk of injury and caused his injury.

The United States District Court of Appeals for the Sixth Circuit affirmed a summary judgment order of the United States District Court for the Western District of Michigan. (Appendix pp. 2, 21). The Sixth Circuit's opinion invoked the rule that *no* duty to warn of obvious dangers exists under Michigan product-liability law. (Appendix p. 17). Plaintiff-petitioner herein argues that the courts in Michigan, pursuant to *Owens v. Allis-Chalmers Corp.*, 414 Mich. 399 (1982), have emphatically and consistently rejected this patent-danger test in favor of one centered on the reasonableness of the risk. Plaintiff further argues herein that the learned court below has fundamentally frustrated Michigan's purposeful shift to product-liability tests that wherever possible preserve material issues of liability for the trier of fact.

On June 22, 1985, Herbert H. Johnson Jr., was a guest at an outdoor party at the summer home of Arthur Anderson, Joanne Anderson, Gerald Connor and Catherine Connor, all third-party defendants who are not respondents in this action. (Deposition of Herbert Johnson, taken March 5, 1988, at 40, 48). The home sits on the shore of Diamond

Lake in Cassopolis, Michigan. The Andersons intended that their guests use a dock extending 80 feet from their property out into the lake. (Deposition of Joanne Anderson, at 29).

During the course of the afternoon, another guest asked Mr. Johnson to join him for a swim, and Mr. Johnson agreed, walking to the end of the dock. (Johnson, March 5, 1988, at 56). With other guests gathered on the dock, Mr. Johnson sat down for a few minutes. (Johnson, March 5, 1988, 59-62). He then stood up at the end of the dock and, with knees bent and hands extended in front of him, dived into the lake. (Johnson, March 5, 1988, at 63-66).

The depth of the water at the end of the 80-foot dock that July was three to four feet. (Deposition of Arthur Anderson, at 33-36). Mr. Johnson was not told how shallow the water was at the end of the dock; he was not warned by anybody of the diving danger. (Johnson, March 5, 1988, at 179-80). It is uncontradicted that no printed signs existed on or near the dock warning of shallow water or diving danger. (Opinion of the District Court, Appendix p. 4). Mr. Johnson had noticed as he sat at the end of the dock that the water was green, but he did not try to see the lake bottom, and he did not in fact see the bottom. (Johnson, March 5, 1988, at 83-84). The spinal cord injury Mr. Johnson sustained when he struck the lake bottom has left him quadriplegic.

The wooden deck surface structure was first installed in the spring of 1985 by defendant Park Shore Marina. (Deposition of John Landow, at 25). The deck sections were made by Lake Shore Products according to Park Shore Marina's specifications. It has been the custom on area lakes to install such wooden dock sections on lake-bottom metal anchors each spring, and to remove them before the onset of winter. Employees of Park Shore

Marina installed the Andersons' new dock by sliding metal cross members into sleeves mounted on the bottom, then fitting the wooden sections atop the metal substructure. (Landow, at 17-18). Park Shore Marina had annually installed an older wooden deck structure for the property's previous owners since 1980. (Landow, at 67). It was Park Shore Marina that advised the third-party defendants in 1984 the old dock was worn out. (Landow, at 8-9).

John Landow, an owner of Park Shore Marina, had known how shallow the water was at the end of the 80-foot dock for at least five years preceding Mr. Johnson's catastrophic dive. (Landow, at 68). Local people knew Diamond Lake generally to be a shallow lake. (Landow, at 27). Further, Landow knew people often dived off the docks on Diamond Lake. Of all the dives he had seen off docks on the lake, Landow estimated that half were into water only three or four feet deep. (Landow, at 69). Importantly, before Mr. Johnson's injury, Landow knew that people who dived into three or four feet of water could sustain severe spinal cord injury. (Landow, at 70, 72-73).

Defendant Lake Shore Products is a dock-manufacturing business. When it made the wooden surface for the Andersons' dock at the request of Park Shore Marina, Lake Shore Products was not aware that the dock was on Diamond Lake. (Deposition of James Starr, at 17-18). Yet James Starr, an owner of Lake Shore Products, knew that his docks frequently were placed in shallow water, that people often used docks as diving platforms, and that a person diving off a dock into shallow water could sustain serious, permanent injury. (Starr, at 36). This knowledge notwithstanding, Lake Shore Products did not print a warning as to diving dangers on this dock or any of its docks. Nor did it furnish warning signs to be posted near docks made from its wooden dock sections. (Starr, at 31).

Mr. Johnson brought suit under two theories, breach of the implied warranty of fitness and merchantability, and negligence in the manufacturing, selling and installing of the dock by defendants-respondents Lake Shore Products, Inc., Park Shore Marina, John Landow and Steven Palatinas, d/b/a Park Shore Marina.

The Sixth Circuit, in affirming summary judgment for the defendants, represented as undisputed fact that 1) the dock itself contained no defect, and 2) the risk of Mr. Johnson's injury was open and obvious. On the contrary, these issues go to the core of the complaint and are very much in dispute, as the record bears out. Though required on a summary judgment motion to construe the evidence in a light most favorable to the non-movant, here the court below did the opposite. The learned court erred by failing even to acknowledge plaintiff's proof that the dock was defective and that the risk of quadriplegia to a novice diving off a dock extending nearly 80 feet into a lake was not obvious.

SUMMARY OF THE ARGUMENT

The learned court below plainly erred in holding that, under Michigan products liability law, there is necessarily no duty to warn or protect against dangers which are obvious. *Johnson v. Park Shore Marina et al.*, No. 88-1769, slip op. at 1 (6th Cir. Apr. 25, 1989) (per curiam). To the contrary, the Supreme Court of Michigan has explicitly ruled that the test of liability "is not whether the risks are obvious, but whether the risks were unreasonable in light of the foreseeable injuries." *Owens v. Allis-Chalmers Corp.*, 414 Mich. 399 at 425, 327 N.W.2d 222 (1982). Since *Owens*, patency of the danger can at best be viewed as

one among many factors that may or may not make a product-related danger unreasonable.

In rejecting the patent-danger rule, the Michigan courts joined the trend among state judiciaries recognizing the fundamental unfairness of a rule subordinating the question of whether the danger of injury is reasonable to the question of whether the danger could be readily perceived. As the Michigan Supreme Court observed in *Owens*, "Obvious risks may be unreasonable risks, and there is no justification for departing from general negligence principles merely because the dangers are patent." *Id.* at 425. The patent-danger rule mistakenly relied upon below worked to handicap both specific plaintiffs and consumers generally by immunizing makers of blatantly defective products from liability. *Products Liability—Patent Danger*, 35 ALR 4th 861.

The facts of the second of the two cases relied upon by the Sixth Circuit, *Ross v. Jaybird Automation, Inc.*, 172 Mich. App. 603, 432 N.W.2d 734 (1988), are not analogous to the issues here. The rule of *Ross*—that where a product-related danger is obvious and the product itself is not defective, there is no liability—is strictly limited to cases where expert users use products aimed at professionals. So said the Michigan Supreme Court in *Antcliff v. State Employees Credit Union*, 414 Mich. 624, 327 N.W.2d 814 (1982), when it promulgated the rule invoked in *Ross*. Both *Antcliff* and *Ross* involved expert users, unlike the case of a recreational swimmer here on appeal.

The mere fact that a product was well made does not mean it is not defective. Michigan courts have long recognized that an inadequate warning is in itself a product defect. *Smith v. E.R. Squibb & Sons*, 405 Mich. 79, 89, 273 N.W.2d 476 (1979).

The reasonableness rule of *Owens* pervades products-liability law in Michigan today. Where the facts determining reasonableness are at issue, the question of liability is one of fact for the jury. *Horen v. Coleco Industries, Inc.*, 169 Mich. App. 725, 729, 426 N.W.2d 794 (1988); *Gootee v. Colt Industries, Inc.*, 712 F.2d 1057 (6th Cir. 1983).

The Sixth Circuit's affirmation of summary judgment in favor of the defendants ignores the substantial fact questions raised by plaintiff-petitioner as to the obviousness of the danger and the defectiveness of the product. Although the court below adopts the contrary view that the danger was in fact obvious and the product itself was not in fact defective, on a summary judgment the court is required to view the facts in the light most favorable to the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Further, under Michigan law, a genuine issue as to whether a user was fully aware of a product danger is a fact question precluding summary judgment for manufacturers. *Michigan Mutual Insurance Co. v. Heatilator Fireplace*, 422 Mich. 148, 366 N.W.2d 202 (1985).

In denying Mr. Johnson a jury trial, the Sixth Circuit failed even to heed its own advice as to the importance of leaving product liability questions for Michigan juries. "The right to put one's case before the jury has been carefully guarded in products liability cases" in Michigan. *Gootee, supra*, 712 F.2d at 1063 citing to *Green v. Volkswagen of America, Inc.*, 485 F.2d 430 (6th Cir. 1973).

A recent Michigan appellate case made clear that the duty to warn in a diving case is a fact question for the jury. *Horen, id.*, 169 Mich. App. at 729, 426 N.W.2d 794 (1988). In *Horen*, the court held that the risk of a serious injury was sufficient to preclude summary judgment favor-

ing defendant, even where the shallow depth of an above-ground pool was plain to see for the plaintiff. In an even more recent diving case, the appellate court cited mounting evidence of catastrophic diving injuries in holding that divers may not fully sense the risk of shallow dives without proper warning. *Glittenburg v. Wilcenski*, 174 Mich. App. 321, 326 (1989). "We do not believe the risk of serious injury, in this case paraplegia, is obvious in the absence of some kind of warning. A simple act of pleasure on a hot summer's day, a dive into a pool, can result in a lifetime of heartache, frustration, pain and loss. Nothing in the appearance of the pool itself gives a warning of the very serious consequences to which a mundane dive can lead." *Id.* at 326.

If anything the risk of diving into a backyard pool should be more obvious to an unsuspecting user than the risk of diving off a dock extending 80 feet over a lake. That the dock's end sat in shallow water, and that diving into shallow water invited serious injury, were foreseeable to the defendants in this case, as the transcript record bears out.

In summary, the Sixth Circuit erred by adhering to a patent-danger rule rejected by the Michigan courts; by viewing the facts in a light favoring the movant rather than non-movant; and by failing to abide by Michigan's preference in products liability law for jury determination of the reasonableness of a failure to warn of product-related hazards.

ARGUMENT

I.

THE COURT BELOW PLAINLY MISAPPLIED THE WELL-SETTLED RULE OF MICHIGAN PRODUCT-LIABILITY LAW THAT THE DUTY TO WARN OF PRODUCT-RELATED DANGERS TURNS ON HOW FORESEEABLE AND UNREASONABLE THE RISK IS, *NOT* ON HOW OBVIOUS THE DANGER IS.

The learned court below misconstrued both the facts of this case and the law of Michigan in summarily holding that Mr. Johnson was barred from recovering for defendants' failure to warn of a dock-related diving danger where that diving danger was, in the court's view, obvious. First, the record amply raises a fact question as to how obvious it should have been to Mr. Johnson, if at all, that to dive from the dock was to risk quadriplegia. Mr. Johnson said he saw the water's color but not the lake bottom before he dived. (Johnson, March 5, 1988, at 83-84.) As a person unfamiliar with Diamond Lake, he quite reasonably could have thought the water's depth off the end of a 80-foot-long dock well exceeded three or four feet. Further, it is settled law in Michigan that even consciousness of a vague danger, without full appreciation of the seriousness of the consequences, will not bar recovery for failure to warn in a product case. *Graham v. Ryerson*, 96 Mich. App. 480, 489, 292 N.W.2d 704 (1980). In Michigan courts, a genuine issue of material fact as to a product user's awareness of a product danger *precludes* summary judgment for manufacturers on a complaint alleging negligent failure to warn. *Michigan Mutual Insurance Co. v. Heatilator Fireplace*, 422 Mich. 148, 366 N.W.2d 202 (1985). Likewise, in federal practice under F.R.Civ.P. 56(c), the extent of Mr. Johnson's awareness of danger raises

a sufficient fact question to bar summary judgment for the defendants, when the facts are viewed most favorably for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The more fundamental and irreconcilable error of law in the Sixth Circuit's opinion, however, is its patently inaccurate claim that "there is no duty to warn or to protect against dangers which are obvious." *Johnson v. Park Shore Marina et al.*, No. 88-1769, slip op. at 1 (6th Cir. Apr. 25, 1989) (per curiam). This quite plainly misstates Michigan products liability law, as that state's courts have made clear in a slew of opinions pursuant to *Owens v. Allis-Chalmers Corp.*, 414 Mich. 399, 327 N.W.2d 222 (1982). Adopting the view already held at the time by that state's appellate courts, the Michigan Supreme Court in *Owens* held that while obviousness of the danger may be one of several *factors* to be weighed under the test for liability, the test itself is whether the risks are unreasonable in light of foreseeable injuries. *Id.* at 425. Thus, even an obvious product-related danger would not bar recovery if the risk of injury from the danger was both foreseeable and unreasonable.

That oft-stated reasonableness rule appeared again in *Horen v. Coleco Industries, Inc.*, 169 Mich. App. 725 at 729 (1988), a swimming pool injury case procedurally and factually analogous to the issues here on appeal. The court in *Horen* further held that a duty to warn question becomes a standard of care question for the *jury*, not a question of law for the court, where the issue is whether the product-related risk was unreasonable. *Id.* at 729. The pro-jury question, anti-patent danger message of *Horen* was reinforced in a similar swimming-pool injury case, *Glittenburg v. Wilcenski*, 174 Mich. App. 321, 435 N.W.2d 480 (1989). There the court, citing mounting accident data on catastrophic dives, concluded that unwarned divers con-

front injury risks far exceeding what their senses may tell them—even where they can readily judge the depth of an above-ground swimming pool. *Id.* at 326. Stressing plaintiffs' equities in cases where routine activities turn to disaster, the appellate court held that the pool builder had a duty to warn of the risk of paralysis from shallow dives:

> "We do not believe the risk is open and obvious. We believe the risk of serious injury, in this case paraplegia, is not obvious in the absence of some kind of warning. *A simple act of pleasure on a hot summer's day, a dive into a pool, can result in a lifetime of heartache, frustration, pain and loss. Nothing in the appearance of a pool itself gives a warning of the very serious consequences to which a mundane dive can lead.*" (emphasis added) *Id.* at 326.

Significantly, the result below failed to heed even the Sixth Circuit's own advice as to the importance of leaving products liability questions for Michigan juries. In a products case in which plaintiff appealed a directed verdict for defendant, the Sixth Circuit cautioned that, in Michigan:

> "The right to put one's case before the jury has been carefully guarded in products liability cases." *Gootee v. Colt Industries Inc.*, 712 F.2d 1057 at 1063 (6th Cir. 1983), citing to *Green v. Volkswagen of America, Inc.*, 485 F.2d 430 (6th Cir. 1973).

Similarly, in a case alleging defective prescription drug design, the Sixth Circuit noted "the strong inclination in Michigan law toward favoring trial of any properly pled claims unless those claims are 'clearly unenforceable as a matter of law.' " *Bogorad v. Eli Lilly & Co.*, 768 F.2d 93, 95 (6th Cir. 1985), quoting *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164 (1984).

The reasonableness rule of *Owens* and the jury-question admonition of *Horen* pervade contemporary Michigan product cases. In contrast, the discredited patent-danger rule and the variation on that rule relied upon by the court below are, respectively, bad law, and law explicitly limited to facts not analogous to the facts at issue here.

A. The Learned Court's Holding That An Obvious Danger Necessarily Bars A Duty To Warn Of Product-Related Dangers Revives The Patent-Danger Rule Of *Fisher* Long Since Abandoned By Michigan Courts Pursuant To *Owens*.

The obvious-danger rule invoked by the Sixth Circuit derives directly from the pre-1982 standard set forth in *Fisher v. Johnson Milk, Inc.*, 383 Mich. 158, 174 N.W.2d (1970). The Sixth Circuit, in the only statement of law supported by citations in the case below, held:

> "Under Michigan law, 'there is no duty to warn or to protect against dangers which are obvious.' *Pettis v. Nalco Chemical Co.* 388 N.W.2d 343, 346 (Mich. App. 1986). *See also Ross v. Jaybird Automation, Inc.*, 172 Mich. App. 603, 432 N.W.2d 374 (1988) ('there is no duty to warn of known or obvious product-connected dangers where the product itself is not defective or dangerous')."

Johnson v. Park Shore Marina et al., No. 88-1769, slip op. at 1, 2 (6th Cir. Apr. 25, 1989) (per curiam).

The *Pettis* opinion cited by the court below, in turn, ascribed the rule quoted above solely to *Fisher*, 383 Mich. at 160, *Pettis v. Nalco Chemical Co.*, 150 Mich. App. 294, 302, 388 N.W.2d 343 (1986). The rule as phrased in *Fisher* is virtually identical: "There is no duty to warn or protect against dangers obvious to all." Thus, indisputably *Fisher* is the root of law supporting the Sixth Circuit's

opinion as to obvious dangers. As noted above, however, prior to *Pettis* the Michigan Supreme Court in *Owens* had scrapped the patent danger rule of *Fisher*. Said the court: "Obvious risks may be unreasonable risks, and *there is no justification for departing from general negligence and breach of implied warranty principles merely because the dangers are patent.*" (emphasis added). *Owens*, 414 Mich. at 425.

While it did not overturn *Fisher* in so many words, *Owens* strictly limited it to "simple tool" cases, and said that even there, obviousness of the danger is nothing more than a factor among many which may contribute to the conclusion that such products are unreasonably dangerous. "The test, however, is not whether the risks are obvious, but whether the risks were unreasonable in light of the foreseeable injuries." *Id.* at 425. *Prentis v. Yale Manufacturing Co.*, 421 Mich. 670, 688, 365 N.W.2d 176 (1984). *Moning v. Alfono*, 400 Mich. 425, 450, 254 N.W.2d 759 (1977). *Pettis*, 150 Mich. App. at 301-302. *Horen*, 169 Mich. App. at 729.

The district court, in its opinion below granting summary judgment in favor of defendants, reasoned that the patent-danger rule survived *Owens* and remains in force for failure-to-warn cases because *Owens* applied only to design defects, not failure-to-warn cases. (Appendix p. 17). This rationale errs in two respects: 1) Inadequate warnings *are* product defects, as the Michigan Supreme Court resolved in *Smith v. E.R. Squibb and Sons*, 405 Mich. 79, 89, 273 N.W.2d 476 (1979). 2) The reasonableness test of products liability in *Owens*, which supplanted the patent-danger test, was and is the standard in all Michigan product cases, whether the alleged defect is patent or latent. *Horen*, 169 Mich. App. at 729. *Glittenburg*, 174 Mich. App. at 325, *Downie v. Kent Products*, 122 Mich. App.

722, 731, 333 N.W.2d 528 (1983) (jury question as to duty to warn of faulty clutch mechanism in a punch press).

In *Horen*, the court reversed summary judgment for a defendant pool manufacturer which argued it had no duty to warn of the risks of diving off the deck of a swimming pool four to five feet deep because the risk of such a dive was open and obvious. *Horen*, 169 Mich. App. at 729. Noting that the open danger test of *Fisher* no longer stated Michigan law post-*Owens*, the court reasoned that a recreational swimmer might believe a shallow dive could be executed without threat of death or paraplegia. *Id.* at 731. Likewise, a recreational swimmer such as Mr. Johnson had reason to believe he could execute a dive off a lake pier without threat of paralysis. And while he may not have attempted a "shallow" dive as did the plaintiff in *Horen*, that plaintiff had reason to know how shallow the above ground pool was, whereas Mr. Johnson could reasonably have thought the lake was deeper.

In *Owens*, the state Supreme Court affirmed a directed verdict for a forklift manufacturer because of plaintiff's failure to make out the prima facie case that the forklift's lack of a safety belt posed an unreasonable risk in view of available alternatives. *Owens*, 414 Mich. at 429. Thus, the issue was not whether the defect was obvious, but whether a defect existed, obvious or not. In contrast, Mr. Johnson clearly has made out the case that a failure to warn of the dock-related diving danger foreseeably exposed him to an unreasonable risk of injury.

Even *Fisher*, source of the patent-danger rule, is readily distinguishable on the facts from the case here at issue. There the court held that the maker of a metal-wire milk bottle case had no duty to warn of the risk of breakage should the bottles drop. *Fisher*, 383 Mich. App. at 164. That danger was obvious to all, the court said.

> "This is not the case of a piece of machinery, looking alright on the surface but containing a defect not observed or observable by plaintiff, which operated in such a fashion, unexpectedly, as to be dangerous and to injure plaintiff." *Id.* at 162.

In contrast, it is contended that the dock which enabled Mr. Johnson's dive was in fact a product with a hidden product-related defect: a shallow lake bottom which one would not expect to find at the end of a long recreational dock.

B. In Citing To The Rule Of *Ross* That No Duty Exists Where The Danger Is Obvious And The Product Itself Is Not Defective, The Sixth Circuit Ultimately Relied Upon A Rule Explicitly Limited To Expert Product Users Distinguishable From Mr. Johnson.

The learned appellate court's reference to the patent-danger rule parenthetically included the rule of *Ross v. Jaybird Automation, Inc.*, 172 Mich. App. 603, 432 N.W.2d 374 (1988): "(T)here is no duty to warn of known or obvious product-connected dangers where the product itself is not defective or obvious." *Johnson*, No. 88-1769, slip op. at 2. *Ross*, in turn, took the rule from *Antcliff v. State Employees Credit Union*, 414 Mich. 624, 327 N.W. 2d 814 (1982). In *Antcliff*, which followed *Owens* by less than one month, the Michigan Supreme Court said, "We hold only that on the facts of *this* case *this* defendant was under no duty to instruct on or give directions for the safe rigging of its product." (emphasis in original) *Id.* at 627. There the court held that the manufacturer of a powered scaffold had no duty to instruct a crew of painters expert in scaffold use as to safe rigging of a scaffold. *Id.* at 635. Similarly, the state appellate court in *Ross* held that the maker of a machine used in metal stamping had no duty to warn expert machinists of the hazards of a faulty electrical hookup. *Ross*, 172 Mich. App. at 376. The

legal thread connecting these cases is that each involved expert product users facing dangers obvious to expert eyes.

Importantly, the Sixth Circuit itself acknowledged this limit on the rule of *Antcliff* in a Michigan duty-to-warn case about protective goggles which shattered, injuring a factory worker. *Rusin v. Glendale Optical Co., Inc.*, 805 F.2d 650 (6th Cir. 1986). The learned court there observed that in both cases, the manufacturer sold its product to professional users, and the users were experienced and expert. "In view of *Antcliff*," the Sixth Circuit ruled, "we decline to hold that a manufacturer of protective spectacles who sells its product to a sophisticated, professional user like Chrysler has a duty to warn one of Chrysler's highly skilled employees such as the appellee of the availability of alternative products." *Id.* at 654. Here in *Johnson*, however, the Sixth Circuit makes no mention of that recent, contrary treatment of *Antcliff*. *Johnson*, No. 88-1769, slip op. at 2. That inconsistency obscures but cannot change *Antcliff's* restriction to expert users. In that respect, it is readily distinguishable on the facts from this case of an unskilled recreational diver's foreseeable use of a dock for diving.

C. The Rejection Of The Patent-Danger Rule By Courts In Michigan And Throughout The Nation Was A Reasoned Remedy Of A Fundamentally Unfair Rule That Made Assumption Of The Risk A Question For Judges Rather Than Juries, And That Created Incentives For Blatantly Dangerous, As Opposed To Less Perceptible, Product Defects.

By renouncing the patent-danger rule in *Owens*, the Michigan Supreme Court intended more than a technical adjustment in products liability theory. *Owens* was part of a widespread response by the states to mounting criticism of the patent-danger rule as an impediment to jury

trials on the merits and as a legal anachronism incongruous with modern reasonableness tests of liability. The trend gained impetus in 1976 when the New York Court of Appeals overturned *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950) in *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571 (1976). The Michigan Supreme Court had used *Campo* as authority in adopting the patent-danger rule in *Fisher*.

> "Critics reasoned that the patent-danger rule put an unfair burden on product plaintiffs. Where there were 'open and obvious' risks, the worker or other person using the product was deemed to be on a par with the manufacturer. This amounted to applying an assumption of the risk defense as a matter of law, with the added disadvantage that the defendant was relieved of the burden of proving that plaintiff had subjectively appreciated a known risk."

—Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 Hofstra L. Rev. 521, 541 (1974).

> Where the patent danger rule has been rejected or abandoned, the courts have generally reasoned that the latent-patent distinction, which is implicit in the rule, encourages obvious misdesign of products and should not be available to immunize manufacturers of obviously defective or dangerous products from liability.

—*Products Liability—Patent Danger*, 35 ALR4th 861.

In view of this purposeful shift away from the patent danger rule, for the Sixth Circuit to now fall back on the abandoned rule of *Fisher* is to frustrate the reform choice of the courts of the sovereign State of Michigan.

II.

THE SIXTH CIRCUIT'S CONCLUSION THAT THE DIVING DANGER WAS OBVIOUS AND THE DOCK WAS NOT DEFECTIVE CONTRAVENED PROCEDURAL RULES FOR SUMMARY JUDGMENT BY VIEWING FACTS MOST FAVORABLY FOR THE MOVANT, NOT THE NON-MOVANT.

On the issues of fact, the court below erred in surmising that 1) there is no dispute that the dock itself is not defective or dangerous; and 2) the danger of diving into the lake waters off the dock were open and obvious, and Mr. Johnson conceded that fact. *Johnson*, No. 88-1769, slip op. at 2. As to the first, plaintiff has properly pled a dock-related defect in the form of a failure to warn of the foreseeable danger of a risk of serious injury.

As noted above, Michigan courts have long recognized that an inadequate warning is in itself a product defect. *Smith*, 405 Mich. at 89. A manufacturer may have a duty to warn even though a product is perfectly made. *Pettis*, 150 Mich. App. at 301. In its arguments to the courts below, defendants-respondents cited no Michigan cases saying that a product defect must be something other than a failure to warn.

In *Pettis*, the state appellate court held that the maker of a chemical that aids in the molding of molten steel had a duty to warn of an explosion danger when the chemical was overused. *Id.* at 301. The chemical in *Pettis* was defective not in the way it was made, but in the unreasonably risky way it foreseeably combined with its environment. Similarly, the dock's defect is its relation to a shallow lake and the attendant danger to divers.

A long dock over an unusually shallow lake is factually akin to well-made metal ball bearings whose brittleness is hidden from workers who foreseeably strike the bear-

ings with a hammer. *Thomas v. International Harvester Co.*, 57 Mich. App. 75, 82 (1974).

Likewise, bags of charcoal briquettes perfectly made could nonetheless be defective due to failure to adequately warn of a fume hazard arising when charcoals are burned in unventilated areas. *Hill v. Husky Briquetting Co.*, 54 Mich. App. 13, 220 N.W.2d 137 (1974).

The learned court's conclusion that the diving danger was obvious is nowhere supported in the record. Although Mr. Johnson said he had general knowledge that diving into shallow water could break a person's neck, (Deposition of Herbert Johnson, taken March 5, 1988 at 175-178), here he said he did not see and did not know how shallow the lake was at the end of the 80-foot dock. As noted above, vague awareness of a danger alone will not bar recovery. *Graham*, 96 Mich. App. at 489.

While generally the duty question is one of law for the court, *Moning*, 400 Mich. at 436, where the reasonableness and foreseeability of the risk are disputed, the question of liability is for the jury. *Downie*, 122 Mich. App. at 731. *Gootee*, 712 F.2d 1057 at 1064. *Horen*, 169 Mich. App. at 730. *Casey v. Gifford Wood Co.*, 61 Mich. App. 208, 214, 232 N.W.2d 360 (1975).

In *Horen*, the swimming pool case described above, the court reasoned:

> "In this case, however, defendants' argument that they had no duty to warn of the diving danger really relates to the applicable specific standard of care—a question for the jury—instead of the existence of a legal duty." *Horen*, 169 Mich. App. at 730.

The court continued:

> "Where, as here, injury was reasonably foreseeable, the manufacturer's use of reasonable care in guard-

ing against unreasonable or foreseeable risks is a jury question, even where the danger is obvious." *Id.* at 730.

The duty to warn extends to risks associated with foreseeable *misuses* of the product. *Antcliff*, 414 Mich. at 638. In this case, ample evidence exists that defendants could foresee shallow-water-diving from the dock, even if they considered such activity inappropriate. Mr. Landow of the installing company said he knew the water at the end of the dock was three to four feet deep; he knew people often dived off docks at Diamond Lake; and he knew people who dived in shallow water risked serious injury. *Landow*, at 68, 69, 70, 72, 73. Mr. Starr of the dock manufacturer said he, too, generally knew that people diving off docks in shallow water risked major injury. *Starr*, at 36. Viewed in a light favoring the non-movant, these admissions should bar a finding that foreseeability was absent. As to reasonableness, the indisputable fact of Mr. Johnson's injury sufficiently illustrates the magnitude of the risk to preclude summary judgment.

The Michigan Supreme Court ruled out summary judgment in favor of defendants in a duty-to-warn case wherein the evidence raised a genuine issue of material fact as to whether a homeowner was fully aware of the fire risk posed by the blockage of vents on a fireplace made by defendants. *Michigan Mutual*, 422 Mich. 148, 366 N.W.2d 202 (1985). Similarly, here a genuine issue of material fact is raised as to whether Mr. Johnson was fully aware of the risk of quadriplegia posed by the positioning of the dock in shallow water.

CONCLUSION

To summarize, the patent-danger rule invoked by the Sixth Circuit is a discredited standard in Michigan products liability law which here serves only to frustrate that state's determination to preserve factual disputes in products cases for the jury. The Sixth Circuit's conclusion that no such disputes here exist both defies its own guidance in similar recent cases and clearly fails to view the facts most favorably for the non-movant, as the federal rules of procedure require. Plaintiff-petitioner Herbert H. Johnson Jr. respectfully petitions this Court to reverse the judgment below.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

[NOT RECOMMENDED FOR FULL TEXT PUBLICATION]

No. 88-1769

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HERBERT H. JOHNSON, JR.,

Plaintiff-Appellant,

v.

PARK SHORE MARINA; JOHN L. LANDOW, doing business as Park Shore Marina; STEVEN M. PALATINAS, doing business as Park Shore Marina; LAKE SHORE PRODUCTS, INC.,

Defendants, Third Party Plaintiffs-Appellees,

ARTHUR D. ANDERSON; JOANNE ANDERSON; GERALD F. CONNOR; CATHERINE M. CONNOR,

Third Party Defendants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Decided and Filed April 25, 1989

BEFORE: MARTIN, KRUPANSKY, and MILBURN; Circuit Judges.

PER CURIAM. Plaintiff-appellant Herbert H. Johnson (Johnson), has appealed from the decision of the district court granting summary judgment in favor of the defendants-appellees Park Shore Marina, John L. Landow, Steven M. Palatinas, and Lakeshore Products, Inc. denying Johnson's claim that defendants had a duty to warn

divers about the dangers posed by diving off a dock into shallow water. Under Michigan law, "there is no duty to warn or to protect against dangers which are obvious." *Pettis v. Nalco Chemical Co.*, 388 N.W.2d 343, 346 (Mich. App. 1986). *See also Ross v. Jaybird Automation, Inc.*, 432 N.W.2d 374 (Mich. App. 1988) ("there is no duty to warn of known or obvious product-connected dangers where the product itself is not defective or dangerous"). In the case at bar, there is no dispute that the dock itself was not defective or dangerous. Because the dangers of diving into unknown waters are open and obvious, as Johnson himself conceded in his deposition testimony, there was no duty to warn about the danger. Upon review of the claimant's assignments of error, the record in its entirety, the briefs of the parties and the arguments of counsel, this court concludes that the entry of summary judgment was without error.

Accordingly, the summary judgment in favor of defendants-appellees is AFFIRMED for the reasons stated in the district court's June 10, 1988 opinion granting summary judgment.

[Filed June 10, 1985]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. K86-452 CA8

HERBERT H. JOHNSON, JR.,

Plaintiff,

v.

PARK SHORE MARINA, a partnership;
JOHN L. LANDOW, doing business
as Park Shore Marina;
STEVEN M. PALATINAS, doing business
as Park Shore Marina, and
LAKE SHORE PRODUCTS, INC.,

Defendants and Third-Party Plaintiffs,

v.

ARTHUR D. ANDERSON; JOANNE ANDERSON;
GERALD F. CONNOR; and CATHERINE M. CONNOR,

Third-Party Defendants,

and

LAKE SHORE PRODUCTS, INC.,

Cross Plaintiff,

v.

PARK SHORE MARINA; JOHN L. LANDOW; and
STEVEN M. PALATINAS,

Cross Defendants.

OPINION

This matter is before the Court on defendants' motions for summary judgment. The Court finds that no material facts remain in dispute and that defendants are entitled to judgment as a matter of law. Therefore, defendants' motions will be granted.

Facts

The relevant facts are not in dispute. On June 22, 1985 the plaintiff, Herbert Johnson, attended a party at the summer home of a co-worker, Joanne Anderson. Third-party defendants, Arthur and Joanne Anderson and Gerald and Catherine Connor owned the home. The home is located on Diamond Lake in Cassopolis, Michigan, and features a wooden dock which, at the time, extended some eighty feet (80') into the lake. The water in Diamond Lake surrounding the dock was approximately four feet (4') deep. At some point on the afternoon of June 22, Mr. Johnson dove, head first, from the dock into the lake. Because the water was so shallow, he struck the bottom of the lake, breaking his neck and rendering himself a quadriplegic. Mr. Johnson contends that he was unaware of the water's depth at the time, and that he assumed it was safe to dive into the lake because the water was green in color, a large boat was moored at a nearby dock, and because motor boats were running further into the lake. He further contends that the homeowners (third-party defendants Anderson and Conner) did not inform him of the water's depth. It is undisputed that there were no warning signs near the dock, nor were there any labels or other warnings placed on the dock itself.

Mr. Johnson brings this action, pursuant to the Court's diversity jurisdiction, against Park Shore Marina, its pro-

prietors John Landow and Steven Palatinas ("Park Shore"), and Lake Shore Products, Inc. ("Lake Shore"). He also maintains a suit against the property owners in Illinois state court. Park Shore installed the dock at issue. The dock consists of steel support pipes permanently embedded in the lake bed and wooden deck sections which are installed each spring and removed each winter. Park Shore installed the wooden deck sections for five consecutive years, and in 1985, the year of Mr. Johnson's accident. In the spring of 1985, Park Shore replaced certain pieces of the wooden decking which had rotted over the winter. Lake Shore Products, Inc. manufactured these wooden deck sections to Park Shore's and the owners' specifications.

Mr. Johnson premises this action on the theory that defendants Park Shore and Lake Shore were negligent in manufacturing and installing the dock without providing adequate warnings of the shallow water and of the danger associated with diving from the dock, and in failing to provide adequate instructions for the use of the dock. His complaint also alleges a breach of the implied warranty of merchantability, resting on the same duty to warn arguments. Defendants Park Shore and Lake Shore seek summary judgment, arguing that they had no duty to warn of the obvious danger of diving from the dock into shallow water. They also contend that Mr. Johnson was aware of the danger associated with diving into shallow water, although they do not contend that Johnson was aware of the depth of Diamond Lake when he dove into the water on July 22, 1985. Further, defendant Lake Shore argues that it merely supplied replacement deck sections to Park Shore and was never informed of the use to which the sections would be put or of the depth of the water in Diamond Lake.

Since the Court sits in diversity, the Court will apply the substantive law of the state of Michigan, the site of the tort, to this matter. Procedural matters, such as the appropriate standard for summary judgment, are governed by federal law. F.R.Civ.P. 56(c). In considering a motion brought pursuant to Rule 56, the narrow questions presented to this Court are whether there is "no genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." *Id.* The Court cannot try issues of fact on a Rule 56 motion, but is empowered only to determine whether there are issues to be tried. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L.Ed.2d 538 (1986); *In re Atlas Concrete Pipe Inc.*, 668 F.2d 905, 908 (6th Cir. 1982).

The moving party has a right to summary judgment where that party is able to demonstrate, prior to trial, that the claims of the non-moving party have no factual or legal basis. *Celotex Corporation v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265 (1986). As the Supreme Court held in *Celotex*, ". . . the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of any element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 91 L.Ed.2d at 273.

The standard for granting a motion for summary judgment is essentially the same as that for granting a motion for directed verdict. "The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . ." *Anderson*, 91 L.Ed.2d at 214

(1986). The moving party is not entitled to summary judgment where there is sufficient evidence to allow a reasonable jury to return a verdict for the non-movant. *Id.* at 211-12. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 214. *See also, Matsushita*, 89 L. Ed.2d at 587 ("where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial' "). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.*

Discussion

Under Michigan law, in order to recover on a failure to warn theory, the plaintiff must prove each of the four elements of negligence: (1) that defendant owed a duty to plaintiff; (2) that defendant violated that duty; (3) that defendant's breach of duty was the cause in fact and a proximate cause of damages suffered by plaintiff; and (4) that plaintiff suffered damages. *Moning v. Alfono*, 400 Mich. 425, 437 (1977); *Pettis v. Nalco Chemical Co.*, 150 Mich. App. 294, 299 (1986); *Warner v. General Motors Corp.*, 137 Mich. App. 340, 348 (1984). Where the plaintiff pleads breach of the implied warranty of merchantability based upon a failure to warn or a design defect, the plaintiff must prove exactly the same elements. *Anticliff v. State Employees Credit Union.* 414 Mich. 624, 637-38 (1982); *Smith v. E R Squibb & Sons, Inc.*, 405 Mich. 79, 273 N.W.2d 476, 479-80 (1978); *Guaranteed Construction Co. v. Gold Bond Products*, 153 Mich. App. 385, 392-93 (1986); *Spencer v. Ford Motor Co.*, 141 Mich. App. 356, 361 (1985). Under either theory, the plaintiff must establish that the product itself was "not reasonably fit for its

intended, anticipated or reasonably foreseeable use." *Guaranteed Construction*, 153 Mich. App. at 392; *Goldman v. Phantom Freight*, 168 Mich. App. 472, 481 (1987); *Trotter v. Hamill Manufacturing Co.*, 143 Mich. App. 593, 599 (1985) ("the defendants may be subject to liability for failure to warn about a risk that is related to intended uses and reasonably foreseeable uses"). The duty to warn extends to foreseeable risks associated with reasonably foreseeable misuses of a product. *Antcliff*, 414 Mich. at 638; *Pettis*, 150 Mich. App. at 301; *Trotter*, at 602. Inadequate warnings alone can constitute a product defect. *Smith*, 273 N.W.2d at 479. As the Michigan Supreme Court held in *Smith*:

> [W]hen the factual issue is not whether the product itself is defective, but is whether the manufacturer has provided adequate warnings, the existence of a product defect and a breach of duty is determined by the same standard—reasonable care under the circumstances. . . . The test for determining whether a legal duty has been breached is wheher defendant exercised reasonable care under the circumstances.

Smith v. E R Squibb & Sons, Inc., 405 Mich. 79, 273 N.W. 2d 476, 480 (1978).

The duty to warn arises where the manufacturer is aware of risks associated with the intended and reasonably foreseeable uses of a product:

> A manufacturer's duty is not just to use reasonable care in the design and manufacture of a product. A manufacturer may have a duty to warn even though a product is perfectly made. A manufacturer is liable in negligence for a failure to warn the purchasers or users of its product about dangers associated with intended uses and also foreseeable misuses. A manufacturer's standard of care includes the dissemination of information, whether styled as warnings or instruc-

> tions, as is appropriate for the safe use of its product. . . . However, there is no duty to warn or protect against dangers which are obvious to all.

Pettis v. Nalco Chemical Co., 150 Mich. App. 294, 301-02 (1986). *See also, Antcliff v. State Employees Credit Union*, 414 Mich. 624, 639 (1982) (policy requiring adequate warnings not applied "in situations involving known or obvious product-connected dangers where the product itself is not defective or dangerous.").[1]

In addition to demonstrating the existence of a duty to warn (e.g., that there are reasonably foreseeable risks associated with the intended and foreseeable uses of a product), the plaintiff must demonstrate that the product proximately caused his or her injuries. "Products liability actions grounded in negligence or breach of implied warranty require a causal connection between the manufacturer's negligence or product defect and the plaintiff's injury. . . ." *Spencer v. Ford Motor Co.*, 141 Mich. App. 356 (1985). As the Michigan Supreme Court recently explained, Michigan courts, "have never gone so far as to make sellers insurers of their products and thus absolutely liable for any and all injuries sustained from the use of those products. . . . [W]e require the plaintiff to prove that the product itself is actionable—that something is wrong with it that makes it dangerous. This idea of 'something wrong' is usually expressed by the adjective 'defective' and the plaintiff must, *in every case, in every jurisdiction*, show that the product was defective." *Prentis v. Yale Manufacturing Co.*, 421 Mich. 670, 682-83 (1984) (emphasis in original).[2]

Plaintiff argues that the defendants in this case were negligent and breached the implied warranty of merchantability by failing to warn him of the dangers of diving off the dock into shallow water, by failing to warn him

that the water was shallow and by failing to provide adequate instructions on the use of the dock. The product alleged to have been defective is the dock itself. The defect alleged is the failure to warn of the dangers associated with the use of the dock as a diving platform. Essentially, the plaintiff argues that the dock, which appears to have been properly and soundly constructed, became an unreasonably dangerous product because it was not installed with the appropriate warnings. Plaintiff asserts that, had he been warned of the shallow water, he would not have dived into the lake.

In order to establish that a failure to warn was the proximate cause of an injury, the plaintiff must demonstrate that the presence of a warning would have avoided the accident. *Spencer*, 141 Mich. App. at 361-62. The plaintiff must also establish, however, that the product itself was defective, in the sense that it was unreasonably dangerous because it lacked the appropriate warnings or instructions. *Prentis*, 421 Mich. at 682-83. A product is unreasonably dangerous if the risks associated with its use are unreasonable in light of the foreseeable injuries. *Prentis*, 421 Mich. at 688; *Owens*, 414 Mich. at 425; *Moning v. Alfono*, 400 Mich. 425, 450 (1977); *Guaranteed Construction*, 153 Mich. App. at 392-93; *Pettis*, 150 Mich. App. at 301-02. Thus, in order to establish that the defendants are responsible for his injuries, the plaintiff must demonstrate that the dock was unreasonably dangerous for its intended and foreseeable uses because it did not contain a warning that the water in Diamond Lake was too shallow to permit head-first diving from the dock.

Certainly, the danger that individuals would dive from the dock into Diamond Lake was foreseeable, as was the possibility that an individual who dove would be seriously injured. And we can take plaintiff at his word that the

presence of a warning regarding the depth of Diamond Lake would have prevented him from diving. But this does not establish that the dock itself was unreasonably dangerous, nor does it establish that the dock was the proximate cause of plaintiff's injuries.

Plaintiff was injured when he dove from the dock into the shallow waters of Diamond Lake. The dock itself did not give way, nor did plaintiff slip and fall into the water because the surface of the dock was improperly constructed. Nothing about the dock, except its presence on the shore of Diamond Lake, contributed to the plaintiff's injuries. We may accept as true plaintiff's characterization of the defendants as the manufacturers and designers of the dock.[3] The fact remains, however, that nothing the defendants did, nor any property of the dock they constructed, contributed to plaintiff's injuries. The cause of his injuries was Diamond Lake's shallow water, not the dock. Suppose that, instead of a dock, the summer home was situated on a cliff, or a dune above the lake. If plaintiff dove from such a natural structure into the shallow water of the lake, he would have been injured in exactly the same way. The same result would have occurred if plaintiff dove into the water from the deck of a boat, or from a large rock located near the shore. The presence or absence of the defendant's product would not have changed plaintiff's injuries.

In every case in which a duty to warn has been found, something about the product at issue was the proximate cause of the plaintiff's injuries. In *Pettis v. Nalco Chemical Co.*, 150 Mich. App. 294 (1986), for example, the plaintiff was injured when a mold used in the manufacture of steel ingots exploded. The mold exploded because it had been treated with a chemical manufactured by the defendant which exploded when molten steel was poured into

the mold before the chemical had evaporated. In other words, plaintiff was able to demonstrate that the presence of defendant's product in the mold caused the mold to explode, causing his injuries. Similarly, in *Thomas v. International Harvester Co.*, 57 Mich. App. 79 (1974), the plaintiff was injured when a bearing on his tractor chipped and flew into his eye after plaintiff hit the bearing with a hammer. The bearing was manufactured of brittle steel, likely to chip upon impact. Plaintiff demonstrated that the product itself—the bearing—caused his injuries because he would not have been injured had the bearing been made of stronger steel or if he had been warned not to hit the bearing with a hammer. *See also, Simonetti v. Rinshed-Mason Co.*, 41 Mich. App. 446 (1972) (paint thinner exploded, burning plaintiff).

In this case, that causal connection is lacking because there is simply no evidence that dock itself contributed to plaintiff's injuries. As demonstrated above, plaintiff's injuries would have been exactly the same if he dove from some other structure into shallow water. The plaintiff cites, and the Court has found, no case imposing liability for failure to warn under similar circumstances. The only factually similar cases found by the Court hold in favor of defendants. In *Hensely v. The Muskin Corp.*, 65 Mich. App. 662 (1973), the plaintiff was injured when he dove from a seven-foot high garage into a swimming pool only four feet deep. The court held that, "Neither the manufacturer, the seller, nor the [owner] were under any duty to warn this plaintiff of an obviously dangerous use of an otherwise undangerous product." *Id.* at 663. *See also, Myers v. Donnatacci*, 220 N.J. Super. 73, 531 A.2d 398 (1987) (swimming pool manufacturers' trade association under no duty to warn of danger of diving into pools of shallow depth). In *Gordon v. Goldman Brothers, Inc.*, 515

N.Y.S.2d 39, 130 A.D.2d 457 (1987), the plaintiff was injured when he fell while hiking on a sharply sloped and gravel-covered outcropping of rock. He sued the sellers and manufacturers of the boots he was wearing at the time of the fall, on the theory that they owed a duty to warn him of the dangers associated with hiking while wearing these particular boots. The court found in favor of the defendants under the following reasoning:

> The more serious defect in the plaintiffs' proof, however, and that which requires the dismissal of the complaint . . . pertains to the issue of causation. Assuming that the boots in question were not designed for use on rocky or mountainous terrain, the circumstances of the accident do not on their face establish that the boots were in any way responsible for the fall. Noticeably missing from the plaintiffs' papers is any expert's affidavit or other evidence attesting to the fact that different boots might have prevented the accident.

Id., 515 N.Y.S.2d at 40. The *Gordon* court's reasoning is equally applicable to this case. There is simply no evidence that the dock itself had anything to do with plaintiff's injuries. Even if we accept plaintiff's unsupported allegation that he would not have dived into the water had he been warned of its depth, there is no showing that the product itself—the dock—in any way contributed to the severity of his injuries. His injuries would have been the same had the dock been made of different material, or built by different people. Indeed the injuries would have been the same had the dock not been in existence, so long as plaintiff found some platform from which to dive into Diamond Lake. I find therefore, that defendants are entitled to judgment as a matter of law because there is no showing that their product was causally connected to the plaintiff's injuries.

Even if we assume causation, however, defendants would still be entitled to judgment as a matter of law, since I cannot find that the defendants had a duty to warn in this instance. Under Michigan law, products manufacturers have no duty to warn "in situations involving known or obvious product-connected dangers where the product itself is not defective or dangerous." *Antcliff v. State Employees Credit Union*, 414 Mich. 624, 639 (1982). There is no argument here that the dock itself was defective, except to the extent that it did not include any warnings. Plaintiff argues that the danger here was not obvious because most individuals are unaware of the dangers of diving into shallow water.[4] That very well may be true, but it does not establish that the defendants were responsible for plaintiff's injuries. Injuries are caused when people miscalculate the depth of the water into which they dive or where, as here, they dive into water without considering how deep or shallow it might be. But the fact remains that the platform from which they dive has nothing to do with the fact or the extent of their injuries. Plaintiff argues, essentially, that the defendants had a duty to warn about something other than the product they manufactured—that they had a duty to warn about the lake on which their product was situated. But the depth of the lake did not render the dock itself an unreasonably dangerous product for its foreseeable uses, since the dock did not alter or exacerbate the shallowness of the lake.

As the Michigan Supreme Court held in *Moning v. Alfono*, 400 Mich. 425, 438-39 (1977), "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. . . . [T]he question whether there is the requisite relationship,

giving rise to a duty . . . depend[s] in part on foreseeability—whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable." In order to answer the question of whether a duty to warn existed, the Court must examine whether the risk associated with the product is outweighed by the utility of the manufacturer's conduct. *Id.* at 450. *See also, Prentis*, 421 Mich. at 688. Thus, in order to find, as a matter of law, that the defendants owed a duty to warn in this case, I would have to be willing to hold that the utility of the defendants' conduct in creating a dock was outweighed by the risk that someone would use that dock as a diving platform and be injured as a result. I am simply unwilling to do that. To find liability in this case would be to say that the defendants ought never to build a dock on shallow water, because it creates an invitation for some unwitting individual to dive into the water and break his or her neck. Even though it is foreseeable that people will use docks as diving platforms and that they will be injured if they dive into shallow water, I cannot find that the dock manufacturers have a duty to warn because they have no control over, nor any responsibility for, the depth of the water on which their products are placed.[5] As the court concluded in *Antcliff*, "[T]he circumstances here (a non-defective product lacking in dangerous propensities and a known or obvious product-connected danger) do not support application of the policy which would require [the manufacturer] to provide instructions for the safe [use] of its product." *Antcliff*, 414 Mich. at 639-40. Because the dock itself was not defective, and because the dangers of diving into shallow water, while perhaps under-appreciated, are well-known, I cannot find that the defendants had a duty to warn plaintiff of the risks posed by his decision to dive into Diamond Lake.

I find, therefore, that the defendants are entitled to judgment as a matter of law. First, I find that the plaintiff has been unable to demonstrate that the defendants' product was a cause of his injuries. Even assuming that the product caused plaintiff's injuries, I find that defendants had no duty to warn in this instance because the dock was not defective and the danger of diving into shallow water is well-known. Therefore, the defendants' motions for summary judgment are granted.

This resolution of the defendants' motions for summary judgment necessarily disposes of the third-party complaint against the homeowners, Arthur and Joanne Anderson and Gerald and Catherine Connor. The third-party defendants were brought into this action on a contribution/indemnity theory by the principal defendants. Since there is no liability on the part of the principal defendants, there can be no action against the third-party defendants for contribution or indemnity. The third-party complaint is, therefore, dismissed.

DATED in Kalamazoo, MI:
June 10, 1985

/s/ RICHARD A. ENSLEN
RICHARD A. ENSLEN
U.S. District Judge

FOOTNOTES

1. Plaintiff argues that the "obvious danger" rule no longer applies under Michigan law, citing *Owens v. Allis-Chalmers Corp.*, 414 Mich. 413 (1982). In *Owens*, the Supreme Court held:

> Obvious risks may be unreasonable risks, and there is no justification for departing from general negligence and breach of implied warranty principles because the dangers are patent.
>
> This is not to say that the obviousness of the danger is irrelevant. . . . [T]he obviousness of the risks that inhere in some simple tools or products is a factor in contributing to the conclusion that such products are not unreasonably dangerous. The test, however, is not whether the risks are obvious, but whether the risks are unreasonable in light of the foreseeable injuries.

Id. at 425. The Court finds *Owens* inapposite to the case at bar for several reasons. First *Owens* was a design defect case, not a failure to warn case, and the inquiry in design defect cases differs from the inquiry in failure to warn cases. In fact, the *Owens* court specifically noted that it did not decide any issue regarding the defendant's alleged duty to warn of a product defect. *Id.* at 427. Second, failure to warn cases decided after *Owens* by the Michigan Supreme Court and Court of Appeals have incorporated the "obvious danger" rationale. *See, Prentis*, 421 Mich. at 692-93; *Antcliff*, 414 Mich. at 639; *Pettis v. Nalco Chemical Co.*, 150 Mich. App. 294, 301-02 (1986); *Trotter v. Hamill Manufacturing Co.*, 143 Mich. App. 593, 602-03 (1985); *Warner v. General Motors Corp.*, 137 Mich. App. 340, 348 (1984); *Michigan Mutual Insurance Co. v. Heatilator*, 126 Mich. App. 837, 843 (1983).

While the foreseeability analysis employed in *Owens* appears to have supplanted the "simple tool/obvious danger" test applied in *Fisher v. Johnson Milk Co., Inc.*, 383 Mich. 158 (1970), even the court in *Owens* acknowledged that

the obviousness of the risk posed by certain products is an important factor in determining whether the manufacturer breached a duty owed to purchasers or users of that product. Essentially, in order to prevail, the plaintiff must demonstrate that the product at issue was defective; that it was unfit for its intended uses or foreseeable misuses. When a defect is obvious, or known to the particular plaintiff, it is less likely to render the product unreasonably dangerous in light of the foreseeable injuries associated with its use, since those dangers can be easily avoided by reasonable uses.

2. The facts of *Prentis* are particularly instructive for the case at bar. In that case, the plaintiff was injured while operating a stand-up battery powered forklift. When the forklift experienced a power surge, plaintiff lost his footing and fell to the ground, injuring his hip. The forklift did not fall on or run over plaintiff. The Court affirmed a verdict in favor of defendant, in part, on the theory that the product's alleged defect was not the proximate cause of plaintiff's injuries.

Similarly, in *Spencer*, the court of Appeals affirmed a summary judgment granted to a tire manufacturer, where the plaintiff was unable to show that the existence of a warning would have prevented the accident. In *Spencer*, the plaintiff was injured while changing a tire in the course of his employment. He argued that the tire manufacturer had a duty to warn of the dangers associated with the particular type of tire at issue. The court found the defendant entitled to summary judgment, because the evidence showed that plaintiff continued to change tires in exactly the same manner as before even after the accident occurred. Thus, the court concluded that the presence of a warning would have had no effect on the probability that an accident would occur. Since plaintiff was unable to demonstrate a causal connection between the alleged product defect and the injury he suffered, summary judgment was appropriate. *Id.* at 361-62.

3. Defendants Park Shore, Landow and Palatinas argue that they did not manufacture or design the dock. They argue, instead, that they merely installed existing dock pieces into existing steel supports and repaired those dock pieces which required replacement. Similarly, defendant Lakeshore argues that it did not manufacture the dock itself, since it only manufactured the replacement dock pieces used by Park Shore to repair the dock.

4. The parties disagree on the degree to which this plaintiff was aware of the risks associated with diving into shallow water. Plaintiff asserts that he would not have dived into the water had he known of its depth. The defendants point to plaintiff's admission in his deposition that he had been swimming for many years and that he understood that one could be injured by diving into shallow water.

The Court agrees with plaintiff that his generalized awareness of the risks associated with diving into shallow water does not require the Court to find that he was aware of the danger present in this specific dive. *See, Graham v. Ryerson*, 96 Mich. App. 480, 489 (1980) ("Consciousness of a vague danger, without appreciation of the seriousness of the consequences, may require the manufacturer to provide warning; presentation of credible evidence results in a jury question"); *Cronlie v. Positive Safety Mfg.*, 50 Mich. App. 109, 114 (1973) ("The fact that a person had notice at one time of a danger or defect in a product does not relieve the manufacturer of his duty to warn in every case").

5. Finding a duty to warn here would be like finding that an asphalt manufacturer had a duty to warn automobile accident victims that being thrown onto asphalt paving after a car accident would cause them to injure themselves. Assuming that the paving was properly done, the fact that a street is paved has little if any connection to the injuries caused by automobile accidents.

App. 20

[Filed June 10, 1988]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. K86-452 CA8

HERBERT H. JOHNSON, JR.,

Plaintiff,

v.

PARK SHORE MARINA, a partnership;
JOHN L. LANDOW, doing business
as Park Shore Marina;
STEVEN M. PALATINAS, doing business
as Park Shore Marina, and
LAKE SHORE PRODUCTS, INC.,

Defendants and Third-Party Plaintiffs,

v.

ARTHUR D. ANDERSON; JOANNE ANDERSON;
GERALD F. CONNOR; and CATHERINE M. CONNOR,

Third-Party Defendants,

and

LAKE SHORE PRODUCTS, INC.,

Cross Plaintiff,

v.

PARK SHORE MARINA; JOHN L. LANDOW; and
STEVEN M. PALATINAS,

Cross Defendants.

JUDGMENT ORDER

In accordance with the written opinion dated June 10, 1988;

IT IS HEREBY ORDERED that Defendant Park Shore Marina, John L. Landow and Steven M. Palatinas' Motion for Summary Judgment is GRANTED;

IT IS FURTHER ORDERED that Defendant Lake Shore Products, Inc.'s Motion for Summary Judgment is GRANTED;

IT IS FURTHER ORDERED that the Third-Party Complaint is DISMISSED;

IT IS FURTHER ORDERED that Judgment is entered in favor of DEFENDANTS and against PLAINTIFF and that this case is closed.

DATED in Kalamazoo, MI:
June 10, 1988

/s/ RICHARD A. ENSLEN
RICHARD A. ENSLEN
U.S. District Judge

No. 89-159

In The

Supreme Court of the United States

October Term, 1989

HERBERT H. JOHNSON, JR.,

Petitioner,

vs.

PARK SHORE MARINA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Issue: THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT MICHIGAN PRODUCT LIABILITY LAW PROVIDES THAT IN THE CASE OF SIMPLE PRODUCTS OR TOOLS THERE IS NO DUTY TO WARN OF KNOWN OR OBVIOUS PRODUCT-CONNECTED DANGERS WHERE THE PRODUCT ITSELF IS NOT DEFECTIVE OR DANGEROUS.

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PRELIMINARY STATEMENT

Respondents Park Shore Marina, John L. Landow, d/b/a Park Shore Marina and Steven M. Palatinas, d/b/a Park Shore Marina respectfully request that this court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

STATEMENT OF THE CASE

In 1984, Arthur Anderson, Joann Anderson, Gerald Connor and Kathryn Conner (all third party defendants who are not respondents in this case) purchased a cottage on Diamond Lake, Cassoplis, Michigan. The property came with a dock. The dock would be put in the water every spring and removed in the fall.

After purchasing the cottage, Mr. Anderson called Respondent Park Shore Marina and talked with Respondent John Landow. Mr. Landow and Respondent Steven Palatinas are partners doing business as the Park Shore Marina. Mr. Anderson requested the marina install the dock for the season (Landow, at TR 8). This would have been in the spring of 1984.

Mr. Landow refused to install the dock as the wood decking material had rotted and was therefore unsafe (Landow, at TR 9). Mr. Anderson requested a price on new wood decking material. The price was given and accepted (Landow, at TR 8-14). Park Shore Marina ordered the replacement wood decking sections from Respondent Lake Shore Products. Lake Shore Products delivered the replacement decking to Park Shore Marina (Landow, at TR 10-14). The replacement wood decking consisted of eight 3′ x 12′ sections and three 4′ x 10′ sections.

Park Shore Marina put the dock into the water in the spring of 1984 (Landow, at TR 17-19). The eight 3′ x 12′ sections each overlapped the other a foot and thus the dock extended approximately 80′ into the lake. The three 4′ x 10′ sections were placed on the lake end of the dock to form a "L" shape (Landow, at TR 16-25).

Park Shore Marina did not design the dock. It only sold replacement wood deck sections to the property owners. When Park Shore Marina installed the dock, the property owners' existing steel cross members and sleeves were used to support the decking. The steel cross members slid into steel sleeves which were pipes permanently buried in the lake bed. The sleeves remained in the water all year. (Landow, at TR 16-25).

Park Shore Marina removed the wood decking and steel supports in the fall of 1984 and reinstalled the wood decking and supports in the spring of 1985.

In the summer of 1985 Joann Anderson decided to have a party at the cottage for her coworkers. Petitioner Herbert Johnson is a resident of Chicago and is employed by Amtrak in Chicago as a reservations supervisor. Mrs. Anderson in the director of the department in which Petitioner Johnson is employed.

On June 22, 1985 Petitioner Johnson arrived at the party approximately 2:00 PM Michigan time. He claims to have consumed one beer in the car on the way to the party (Johnson, at TR 18). Petitioner Johnson has testified that after his arrival at the party he went fishing, purposely/playfully bumped a child off the dock into the water near the shoreline (Johnson, at TR 50), drank another beer (Johnson, at TR 36) and discussed with Arthur Anderson the feasibility of pushing a particular adult into the water (Johnson, at TR 37, 44). Mr. Johnson then sat on the end of the dock and dangled his feet in the water.

Petitioner Johnson then decided to go swimming. According to Mr. Johnson's testimony, he got to his feet

and went to a ladder which was attached to the end of the dock. He grabbed the ladder and put one foot in the water. Mr. Johnson decided the water was too cold to enter slowly by descending the ladder so he decided to dive into the lake.

Petitioner Johnson walked back to the end of the dock. He states that he bent his knees and crouched to dive. As he did so he noticed Mr. Anderson quickly coming towards him from the left. Due to his earlier conversation with Mr. Anderson about pushing people in the water, Petitioner Johnson believed Anderson was about to push him in. Petitioner Johnson states he was distracted and hurried his dive into the water (Johnson at TR 61-77, 141-142).

Petitioner Johnson claims that he struck his head on the lake bottom and fractured his neck. As a result, he is quadriplegic. It is claimed the depth of the water was less than four (4) foot at the end of the dock.

Petitioner Johnson was transported to a local hospital where a blood alcohol test was performed. His blood alcohol level was tested at .192 (Henry Guzzo, M.D., at TR 13).

Mr. Johnson has testified at deposition that he never checked the depth of the water, did not see the lake bottom, never looked down into the water before he dove and did nothing to determine the depth of the water before his dive (Johnson at TR 78, 82-84, 175, 180). Petitioner Johnson has been swimming and diving since he was 9 or 10 years of age (Johnson, at TR 183-185). Petitioner Johnson admitted at deposition that if he had given

it any thought he knew that he could fracture his neck by diving into shallow water (Johnson, at TR 175-178).

Petitioner filed a product liability action in the United States District Court for the Western District of Michigan. Petitioner alleged that Respondents Park Shore Marina, Palatinas and Landow breached implied warranties and also were negligent. In reality, however, all parties agree that substantively this was a perfectly fine dock. Petitioner's only theory is that warnings should have been posted on the dock.

> "Johnson agrees with Lake Shore Products' first assertion that "the actual construction of the dock, i.e., the wood, the nails and the manner in which the wood was fastened together, played no role in this accident." (R. 108: Brief by Plaintiff/Petitioner opposing Respondents' motion for summary judgment filed in the trial court at p. 4).

The trial court granted the motions for summary judgment filed by Respondents Park Shore Marina, Landow, Palatinas and Lake Shore Products, Inc. The court granted the motions on two basis: First, the Petitioner was unable to produce any evidence that the Respondents' product, the dock, was a cause of his injuries. Secondly, even assuming the dock caused petitioners injuries, the Respondents had no duty to warn in situations involving know or obvious product-connected dangers where the product itself is not defective or dangerous, i.e. the dock was not defective and the danger of diving into shallow water is well known and obvious.

The Sixth Circuit Court of Appeals affirmed finding that under Michigan law there is no duty to warn of

known or obvious product-connected dangers where the product itself is not defective or dangerous. As there is no dispute that the dock itself was not defective or dangerous (absent the warning) and because the dangers of diving into unknown waters are known and obvious (as Petitioner himself conceded in his deposition testimony) there was no duty by Respondents to warn about the danger.

Petitioner now brings a petition for a writ of certiorari seeking review by this court.

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

1. Michigan Product Liability Law provides that in the case of simple products there is no duty to warn of known or obvious product-connected dangers where the product itself is not defective or dangerous. The wood deck sections sold by Respondents was a very simple product. It was simply a wood platform.

Michigan Law was correctly interpreted and applied by the trial court in granting Respondents summary judgment. The Sixth Circuit Court of Appeals correctly interpreted and applied Michigan law in affirming the trial court.

2. Procedural rules for summary judgment were properly followed by the trial court and the Sixth Circuit on appeal. Michigan law provides that the question of duty is one of law for the court to decide. Petitioner was admittedly aware of the possibility of serious injury when diving off a dock into water whose depth is unknown.

The danger of such a dive was obvious. As a matter of law there was no duty to warn Petitioner of this known or obvious product-connected danger.

3. This action does not come within the "special and important reasons" standard for granting the writ of certiorari. This is not a case involving principles, the settlement of which is of importance to the public as distinguished from that of the parties.

ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT MICHIGAN PRODUCT LIABILITY LAW PROVIDES THAT IN THE CASE OF SIMPLE PRODUCTS OR TOOLS THERE IS NO DUTY TO WARN OF KNOWN OR OBVIOUS PRODUCT-CONNECTED DANGERS WHERE THE PRODUCT ITSELF IS NOT DEFECTIVE OR DANGEROUS.

Petitioner argues the 1982 Michigan Supreme Court Case of *Owens v Allis Chalmers Corp.*, 414 Mich 399, 327 N.W. 2d 222 (1982) completely did away with Michigan law which provides there is no duty to warn of known or obvious product-connected dangers where the product itself is not defective or dangerous. This simply is not the case.

The leading case in Michigan setting forth this rule is *Fisher v Johnson Milk Company, Inc.*, 383 Mich. 158, 174 N.W. 2d 752 (1970). *Fisher* involved a defendant who sold a wire carrier made to carry bottles of milk. The plaintiff dropped the carrier on an icy sidewalk, slipped and fell on the broken glass and was injured.

"There was no inherent, hidden or concealed defect in the wire carrier. Its manner of construction, how the bottles would rest in it, and what might happen if it were dropped, upright, on a hard surface below, with the possibility that the contained bottles might break, was plain enough to be seen by anyone including a patent attorney as well as a milk dealer. There is no duty to warn or protect against dangers obvious to all. *Jamieson v Woodward & Lothrop* (1957), 101 App DC 32 (247 F2d 23). In so holding in support of the trial court's summary judgment for defendant that court said:

"there are * * * on the market vast numbers of potentially dangerous products as to which the manufacturer owes no duty of warning or other protection. The law does not require that an article be accident-proof or incapable of doing harm. It would be totally unreasonable to require that a manufacturer warn or protect against every injury which may ensue from mishap in the use of his product. Almost every physical object can be inherently dangerous or potentially dangerous in a sense. A lead pencil can stab a man to the heart or puncture his jugular vein, and due to that potentiality it is an 'inherently dangerous' object; but, if a person accidently slips and falls on a pencil point in his pocket , the manufacturer of the pencil is not liable for the injury. He has no obligation to put a safety guard on a lead pencil or to issue a warning with its sale. A tack, a hammer, a pane of glass, a chair, a rug, a rubber band, and myriads of other objects are truly 'inherently dangerous' because they might slip * * *. A hammer is not of defective design because it may hurt the user if it slips. A manufacturer cannot manufacture a knife that will not cut or a hammer that will not mash a thumb or a stove that will not burn a finger. The law does not

require him to warn of such common dangers. *Fisher* at p. 160-161.

* * *

Owens v Allis Chalmers, supra, relied upon by petitioner was decided November 23, 1982. The plaintiffs' husband was killed operating a forklift manufactured by defendant. It was claimed the forklift was improperly designed, was unstable and failed to provide some type of a driver's restraint so the driver would not be thrown out in a rollover. Various possibilities were offered: a cage, seatbelts or various types, a bar, and an encapsulating seat with arms. There would be issues such as cost involved, safety effectiveness, the driver utility of each or any of the devices, the practicality of the design, the ability of the driver to perform necessary work with the devices in place, etc. In other words, *Owens* involved a complicated design for a complicated product. The court indicated the test was whether the risks were unreasonable in light of the foreseeable injuries, i.e. look at the magnitude of the risk and the reasonableness of the proposed design. However, the court explicitly realized that in cases involving simple products the *Fisher* obvious risk test continues to apply:

> "Our Court of Appeals has essentially limited the language in *Fisher* by the fact that *Fisher* involved a simple product or tool. * * * (citations deleted) We believe that such a limitation is proper."
> *Owens* at p. 425.

The court further noted *Owens* was not a "duty to warn case". *Owens* at p. 427.

Obviously, the *Owens* case did not completely do away with the *Fisher* test which indicates there is no duty to warn or protect against dangers which are obvious. Two weeks after *Owens* was decided, the Michigan Supreme Court decided *Antcliff v. State Employees Credit Union*, 414 Mich. 624, 327 N.W. 2d 814 (December 7, 1982). In *Antcliff* the plaintiff was injured when a powered scaffold on which he was working gave way and he fell to the ground. It was claimed the manufacturer and seller of the scaffold had a duty to instruct or give directions for the safe rigging of the scaffold.

> "In sum, our prior decisions support a policy that a manufacturer's standard of care includes the dissemination of such information, whether styled as warnings or instructions, as is appropriate for the safe use of its product. If warnings or instructions are required, the information provided must be adequate, accurate and effective.
>
> Although this policy has found expression in a variety of contexts, most often involving warnings, it is not limited to warnings. It is broad enough to encompass instructions for use. To conclude otherwise would be to restrict the sweep of the law of negligence in this state.
>
> *This policy has limits. It has been applied in instances where the product itself had dangerous propensities. Out of recognition that the manufacturer's interests are also entitled to protection, this policy has not been applied in situations involving known or obvious product connected dangers where the product itself is not defective or dangerous. Fisher v Johnson Milk Co., Inc.*, 383 Mich 158; 174 N.W.2d 752 (1970) (wire milk bottle carrier). See also, Anno: Products liability-duty to warn, 76

> ALR2d 9, 28-37, and cases cited therein" (Emphasis added.) *Antcliff*, at 638-639.

The scaffold itself was not found to be defective. The plaintiff was charged with full appreciation of the danger of inadequately supporting the scaffold.

> "As a result, the circumstances here (a non-defective product lacking in dangerous propensities and a known or obvious product-connected danger) do not support application of the policy which would require Spider to provide instructions for the safe rigging of its product." *Antcliff*, at 639.

In *Michigan Mutual Insurance Company v. Heatilator Fireplace*, 422 Mich. 148, 366 N.W.2d 202 (1985) the Michigan Supreme Court again confirmed the *Fisher* obvious danger test still exists for simple products or tools. However, the *Heatilator* case did not involve an obvious or known danger or a simple tool. It involved a complex prefabricated fireplace with glass doors, various air vents, an inner metal fire chamber and a second and larger outer shell with an inner space designed to keep the outer shell sufficiently cool.

See also *Ross v Jaybird Automation, Inc.*, 172 Mich. App. 603, 432 N.W.2d 374 (1988) where as late as November, 1988 the Michigan Court of Appeals stated:

> "A seller or manufacturer is generally liable in negligence for failure to warn purchasers or users of its product about dangers associated with intended uses and foreseeable misuses. *Antcliff v. State Employees Credit Union*, 414 Mich 624, 637; 327 N.W.2d 814 (1982), reh den 417 Mich 1103 (1983); *Pettis v Nalco Chemical Co.*, 150

> Mich App 294, 301; 388 N.W.2d 343 (1986), lv den 426 Mich 881 (1986). This standard of care includes dissemination of information, either warnings or instructions, as is appropriate for the safe use of the product; such information must be adequate, accurate, and effective. *Pettis, supra,* 392, *However, there is no duty to warn of known or obvious product-connected dangers where the product itself is not defective or dangerous. Antcliff, supra,* p 639. *Whether a manufacturer owes a duty to warn or to instruct is a question of law for the court to decide. Id.,* p 640." *Ross* at 606-607. (Emphasis added.)

Nowhere does a Michigan court restrict this rule to a product distributed only to highly skilled employees charged with particular knowledge of a product. However, the rule does apply equally to a danger obvious to the expert's eye.

Petitioner cites two Michigan Court of Appeals decisions involving swimming pools as standing for the proposition that the *Fisher* test (no duty to warn of a known or obvious danger inherent in a simple tool or product) no longer exists. The cases cited are *Horen v Coleco Industries, Inc.,* 169 Mich. App. 725, 426 N.W.2d 794 (1988) and *Glittenburg v Wilcenski,* 274 Mich. App. 321, 435 N.W.2d 480 (1989). These cases simply are not applicable.

First, a swimming pool is not a simple product. A swimming pool requires grading, necessarily has sides and a bottom, plumbing, concrete, tile, a liner, circulating motor, filter, heater, chemicals and involves intricate design and manufacture.

Park Shore Marina simply provided perfectly fine and simple wood deck sections off of which the Petitioner, with a blood alcohol level of over .19, rushed to dive into the water head first believing his friend was about to push him into the water.

Secondly, a pool manufacturer has control over the depth of the pool. This is part of the pool design. Respondent Park Shore Marina on the other hand had absolutely no control over the depth of Diamond Lake. The lake bottom on which the Plaintiff apparently struck his head, causing the injury, was not part of the product sold by Park Shore Marina.

Furthermore, neither *Horen* nor *Glittenburg* are decisions of the Michigan Supreme Court.

Petitioner cites various cases to support the theory that a manufacturer may have a duty to warn even though a product is perfectly made. These cases do not involve a simple product or tool which is neither defective nor dangerous with a risk known or obvious.

> *Smith v E.R. Squibb and Sons, Inc.*, 405 Mich. 79, 273 N.W.2d 476 (1979) involved a decedent who died as a result of an allergic reaction to an x-ray dye.
>
> *Pettis v Nalco Chemical Co.*, 150 Mich. App. 294, 388 N.W.2d 343 (1986) involved a chemical used to coat molds which caused an explosion when contacted by molten steel.
>
> *Thomas v International Harvester, Co.*, 57 Mich. App. 79, 225 N.W.2d 175 (1974) involved a ball-bearing which was made of very hard steel and chipped when struck with a hammer.

> *Hill v Huskey Briquetting, Inc.*, 54 Mich. App. 17, 220 N.W.2d 137 (1974) involved a decedent who was killed by fumes when charcoal briquettes were lit.

Furthermore, these case together with the *Heatilator, Horen* and *Glittenburg* decisions all have something in common which is lacking in Petitioner Johnson's case. The product involved was the proximate cause of the injury. The injury was caused by some element of the product-over which the manufacturer has control and is charged with responsibility. Opposed to all of these cases is the situation of Petitioner Johnson. Petitioner was not struck by the dock, did not slip on the dock or was otherwise injured by the dock or from any by-product of the dock. There is simply no evidence of a causal connection between the dock and his injury. The injury was caused by the shallow depth of Diamond Lake. The lake bottom was not part of this product.

> "Product liability actions grounded in negligence or breach of implied warranty require a causal connection between the manufacturer's negligence or product defect and the plaintiff's injury . . . ". *Spencer v Ford Motor Company*, 141 Mich. App. 356, 361, 367 N.W.2d 393 (1985).

To require Respondents, sellers and installers of the decking material, to place a warning sign on the dock would require the paver of the driveway at the cottage to post a sign at the end of the drive stating: "DANGER: DO NOT EXIT DRIVEWAY IN FRONT OF ONCOMING VEHICLE." Michigan law does not require such a warning.

II. PROCEDURAL RULES FOR SUMMARY JUDGMENT WERE PROPERLY FOLLOWED BY THE TRIAL COURT AND THE SIXTH CIRCUIT ON APPEAL.

The theory Petitioner has pursued at the trial level, Court of Appeals and before this Honorable Court has been that Respondents had a duty to post signs on the dock warning of the lake's shallow water.

The question of duty is one of law for the court to decide. *Moning v Alfono*, 400 Mich 425, 254 N.W.2d 759, (1977); *Mach v General Motors Corporation*, 112 Mich. App. 158, 315 N.W.2d 561 (1982); *Antcliff v State Employees Credit Union, supra*.

As stated earlier, as this wood decking material is not defective or dangerous, the manufacturer/seller is not required to warn of situations involving known or obvious product-connected dangers. Reasonable minds could only conclude that there in an obvious danger with diving head first into a lake, the depth of which is unknown. Petitioner Johnson was properly charged with this knowledge. He had been swimming and diving since 9 or 10 years of age. Petitioner admitted at deposition that he never checked the depth of the water, did not see the lake bottom, never looked down into the water before he dove and did nothing to determine the depth of the water before his dive (Johnson, at TR 78, 82-84, 175, 180). Petitioner further admitted that if he had given it any thought he knew that he could fracture his neck diving into the shallow water (Johnson, at TR 175-178).

Petitioner was admittedly aware of the possibility of serious injury when diving off of a dock into water whose

depth was unknown. Furthermore, the danger of such a dive was obvious. As a matter of law, there was no duty to warn Petitioner Johnson or to protect him from the shallow lake bed.

III. THIS ACTION DOES NOT COME WITHIN THE "SPECIAL AND IMPORTANT REASONS" REQUIREMENT SET FORTH IN SUPREME COURT RULE 17 FOR GRANTING REVIEW ON WRIT OF CERTIORARI.

Finally, the petition should be denied based upon Supreme Court Rule 17. This action does not come within the "special and important reasons" requirement for granting the writ of certiorari. The court does not sit to satisfy scholarly interest in intellectually interesting problems nor for the benefit of particular litigants.

* * *

> " . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals." *Rice v Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 Sup. Ct. 614, 619-620 (1955)

Petitioner's argument is without merit and does not meet the Rule 17 threshold.

CONCLUSION

The Sixth Circuit Court of Appeals properly concluded that Respondents had no duty to warn Petitioner about the dangers posed by diving off a dock into shallow water. Respondents Park Shore Marina, Landow and Palatinas respectfully request that the petition for a writ of certiorari be denied and Respondents awarded appropriate damages pursuant to Supreme Court Rule 49.2 on the grounds the instant petition is frivolous.

DATED: August 25, 1989

Respectfully submitted,

JAMES, DARK AND BRILL

By: JOHN C. FISH (P28918)
Attorney for Respondents
Park Shore Marina, Landow
and Palatinas

APPENDIX

LIST OF PARENT COMPANIES SUBSIDIARIES AND AFFILIATES, PURSUANT TO RULE 28.1.

Petitioner Park Shore Marina is not a corporation. It is a partnership wholly owned by Respondents John L. Landow and Steven M. Palatinas.

No. 89-159

In The

Supreme Court of the United States

October Term, 1989

HERBERT H. JOHNSON, JR.,

Petitioner,

vs.

PARK SHORE MARINA, ET AL.,

Respondents.

BRIEF OF RESPONDENT LAKESHORE PRODUCTS, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

A. Where the wooden deck sections manufactured by Lakeshore Products, Inc., which were incorporated into a completed dock by a separate entity, are not defective or dangerous in and of themselves, is there a duty to warn of known, open or obvious dangers?

B. Assuming the existence of a duty to warn, was the failure by the manufacturer of a component part to provide warnings concerning the danger or diving into shallow water the proximate cause of Petitioner's injuries where there is no allegation that the deck section in and of itself caused or aggravated Petitioner's actual injury?

C. Where Federal Court jurisdiction was based upon a diversity citizenship, and the ruling of the Federal District Court is based solely upon interpretation of Michigan common law, is there a substantial federal question meriting review by the United States Supreme Court?

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MISCELLANEOUS

STATUTE INVOLVED – NONE

COUNTER-STATEMENT OF THE CASE

Respondent Lakeshore Products, Inc. accepts the Statement of the Case supplied by Petitioner, Herbert H. Johnson, Jr. with the following exceptions.

Petitioner cites MCLA 600.2925 as the statute involved. This statute, which in and of itself provides no substantive remedy or relief, was nowhere plead or raised in the lower courts. The citation to this definitional section adds nothing to the merits of this case.

Petitioner asserts at page 4 of the Petition for Writ of Certiorari that he was not told how shallow the water was at the end of the dock. This contention was vigorously disputed. There is testimony from Third-party Defendant, Arthur Anderson, who was present on the dock immediately before the Petitioner dove into the water that he told the Petitioner that the water was about three feet deep. (Arthur D. Anderson at TR 32-36)

There is also a dispute concerning the amount of alcohol Petitioner consumed prior to the incident. Although Herbert Johnson testified that he had one beer en route to the Anderson home (Herbert Johnson at TR 17) and got another can of beer after he had been at the Anderson home, (Herbert Johnson at TR 32) a blood alcohol test taken after Petitioner's admission to the hospital revealed the Petitioner's blood alcohol level was .19.

With regard to Respondent Lakeshore Products, Inc., it was the undisputed testimony of James Starr, 50% owner of Lakeshore Products, Inc., that 99% of the sales

of Lakeshore Products, Inc. was wholesale. (James Starr at TR 65)

In Petitioner's Brief filed in response to the initial Motion for Summary Judgment, it was stated:

> Johnson agrees with Lakeshore Products, first assertion that "the actual construction of the dock, i.e., the wood, the nails and the manner in which the wood was fastened together, played no role in this accident." (R.108: Brief by Plaintiff in opposition to Defendant Lakeshore Products, Motion for Summary Judgment at p 4)

In affirming the Order of Summary Judgment in favor of the Defendants, the Sixth Circuit Court of Appeals adopted Plaintiff's agreement that there was no fault in the dock itself. The Court of Appeals, in affirming the decision of the Federal District Court, held that Petitioner both failed to establish that the alleged defects were a proximate cause of his injuries, and further Petitioner failed to establish there was a duty which had been breached by the Respondents.

SUMMARY OF ARGUMENT

The only products supplied by Respondent Lakeshore Products, Inc. were sections of wooden deck. Few items could be simpler. Because the product is simple and because any dangers were, as the District Court found, known and obvious, there is no duty to warn.

Furthermore, Michigan Courts have consistently held that the supplier of component parts, not dangerous in and of themselves, is under no duty to warn of a defect

which depends upon the integration of the component into a completed unit. If there is a duty to provide some warning in this case, it is not the duty of Respondent Lakeshore Products, Inc., the mere supplier of a component part.

Finally, Petitioner has failed to establish, as outlined in Rule 17 of the United States Supreme Court, a substantial federal question which would merit the review of this matter on a Writ of Certiorari.

ARGUMENT

I

RESPONDENT LAKESHORE PRODUCTS, INC. HAD NO DUTY TO PROVIDE WARNINGS FOR USE BECAUSE (A) ITS PRODUCT WAS NEITHER DEFECTIVE NOR DANGEROUS AND ANY RISK WAS KNOWN OR OBVIOUS, AND (B) IT WAS MERELY THE SUPPLIER OF A COMPONENT PART OF THE FINAL PRODUCT.

A. BECAUSE THE PRODUCT OF RESPONDENT LAKESHORE PRODUCTS, INC., A WOODEN DECK, WAS NEITHER DEFECTIVE NOR DANGEROUS, THERE WAS NO DUTY TO PROVIDE EITHER WARNINGS OR INSTRUCTIONS.

There was no dispute in the trial court as to the nature of Petitioner's claim against Respondent Lakeshore Products, Inc.:

> Johnson agrees with Lakeshore Products, first assertion that "the actual construction of the dock, i.e., the wood, the nails and the manner in

> which the wood was fastened together, played no role in this accident". (R.108: Brief by Petitioner in Opposition to Respondent Lakeshore Products, Motion for Summary Judgment, at p 4)

The sole claim of a product "defect" against Respondent Lakeshore Products, Inc. was that it failed to provide some type of warning concerning the danger of diving into shallow water.

Petitioner's analysis of this question is erroneous because it begins with an incorrect assertion of Michigan law, misstates the issues and does not understand the nature of the product involved.

First, with regard to the law in Michigan concerning a duty to warn, the Michigan Supreme Court in *Antcliff v State Employees Credit Union*, 414 Mich 624, 638-639; 327 NW2d 814 (1982) held:

> In sum, our prior decisions support a policy that a manufacturer's standard of care includes the dissemination of such information, whether styled as warnings or instructions, as is appropriate for the safe use of its product. If warnings or instructions are required, the information provided must be adequate, accurate and effective. (footnote omitted)
>
> * * *
>
> This policy has limits. It has been applied in instances where the product itself had dangerous propensities. Out of recognition that the manufacturers interests are also entitled to protection, **this policy has not been applied in situations involving known or obvious product-connected dangers where the product itself is not defective or dangerous.** *Fisher v Johnson Milk Co., Inc.*, 383 Mich 158; 174 NW2d 752

> (1970) (wire milk bottle carrier) See also Anno: *Products Liability-Duty to Warn*, 76 ALR2d 9, 28-37, and cases cited therein. (Emphasis added)

Simply put, where the product itself is not defective or dangerous, there is no duty to warn or to provide warnings or instructions of known or obvious product-connected dangers.

This was the holding of the District Court in this case:

> Because the dock itself was not defective, and because the dangers of diving into shallow water, while perhaps under-appreciated, are well-known, I cannot find that the Defendants had any duty to warn Plaintiff of the risk posed by his decision to dive into Diamond Lake. (R:119 Opinion of Federal District Court, at p 12)

In *Fisher v Johnson Milk Co., Inc.*, 383 Mich 158, 160-161; 174 NW2d 752 (1970) the Michigan Supreme Court addressed the issue of the duty of a manufacturer to warn or protect against dangers obvious to all.

> There was no inherent, hidden or concealed defect in the wire carrier. Its manner of constructions, how the bottles would rest in it, and what might happen if it were dropped, upright, on a hard surface below, with the possibility that the contained bottles might break, was plain enough to be seen by anyone including a patent attorney as well as a milk dealer. There is no duty to warn or protect against dangers obvious to all. *Jamieson v Woodward & Lothrop* (1959), 101 App DC 32 (247 F2d 23). In so holding in support of the trial court's summary judgment for defendant that court said:

> 'there are . . . on the market vast numbers of potentially dangerous products as to which the manufacturer owes no duty of warning or other protection. The law does not require that an article be accident-proof or incapable of doing harm. It would be totally unreasonable to require that a manufacturer warn or protect against every injury which may ensue from mishap in the use of his product. Almost every physical object can be inherently dangerous or potentially dangerous in a sense. A lead pencil can stab a man to the heart or puncture his jugular vein, and due to that potentiality it is an 'inherently dangerous, object; but, if a person accidentally slips and falls on a pencil point in his pocket, the manufacturer of the pencil is not liable for the injury. He has no obligation to put a safety guard on a lead pencil or to issue a warning with its sale. A tack, a hammer, a pane of glass, a chair, a rug, a rubber band, and myriads of other objects are truly, inherently dangerous, because they might slip. . . . A hammer is not of defective design because it may hurt the user if it slips. A manufacturer cannot manufacture a knife that will not cut or a hammer that will not mash a thumb or a stove that will not burn a finger. The law does not require him to warn of such common dangers.

Seen in the light of the clear holdings in *Antcliff* and *Fisher*, Petitioner's reliance upon *Owens v Allis Chalmers*, 414 Mich 413; 326 NW2d 372 (1982) is misplaced. Analysis of the *Owens* case must begin with the Michigan Supreme Court's own statement that *Fisher v Johnson Milk Co., Inc.* still applied to simple product or tools (*Owens*, 414 Mich at 425) and that " . . . this is not a 'duty to warn, case . . . " (*Owens*, 414 Mich at 427).

In *Owens*, plaintiff alleged there was some type of design defect in the vehicle itself which caused the accident, alleged that the stability of the forklift which caused the death of plaintiff's decedent had not been properly tested, and also alleged that the design of the forklift was defective for failing to provide some type of factory-installed driver restraint. 414 Mich at 417.

Implicit in the *Owens* Court's citation to *Fisher* was its acknowledgement that it still applied to simple products.

Furthermore, the plaintiff in *Owens* alleged a defect in the product, consisting of either a lack of stability or the absence of a driver restraint system. Such is not present in the case at bar. Petitioner's sole allegation against Respondent Lakeshore Products, Inc. is failure to provide a warning. The wooden deck section itself was not claimed to be faulty.

Petitioner argues that somehow *Owens v Allis Chalmers Corporation* did away with the simple tool or product doctrine. The fallacy of this argument can be seen simply by comparing the Supreme Court holding in *Owens* with its holding in *Antcliff*. Note that the decision in *Antcliff* came one month *after Owens*. Judge Enslen, in footnote 1 of the Opinion, correctly found "*Owens* to be inapposite to the case at bar . . . " R 119: Opinion of Federal District Court at page 14.

Similarly, *Michigan Mutual Insurance Co v Heatilator Fireplace*, 422 Mich 148; 366 NW2d 202 (1985) still finds the Michigan Supreme Court using the *Fisher* analysis of whether a product is a simple tool in order to decide whether or not there was a duty to warn. In that case the

Court held that a prefabricated "zero-clearance" fireplace, was not a simple tool. 422 Mich at 152.

Based upon this clear understanding of the State of Michigan law, Petitioner's reliance on *Pettis v Nalco Chemical Co.*, 150 Mich 294; 388 NW2d 343 (1986) is misplaced. The Michigan Court of Appeals in *Pettis* specifically found and held that the product in that case was **not** a simple tool:

> We find that Defendant owed a legal duty to provide warnings with its products. While Nalcosil is not classified as a "chemical" by the company, **it is not a simple substance** which is used in everyday life. It is specifically manufactured for use with molten steel. It is not at all obvious to a person of common intelligence that its use could create the danger of an explosion of the steel or of an explosion of such great force as to splatter great quantities of steel out of a large mold. 150 Mich App at 302. (Emphasis added)

Similarly, *Smith v E. R. Squibb & Sons*, 405 Mich 79; 273 NW2d 476 (1978) addresses a product, a prescription drug, which has a totally separate and distinct duty to warn.

> A manufacturer of a prescription drug has a legal duty to warn the medical profession, not the patient, of any risks inherent in the use of the drug which the manufacturer know or should know to exist. 405 Mich at 88. (Emphasis added)

It is also apparent from a review of the opinion in *Smith*, that it did not address the question of whether or not a warning should be given, but rather whether or not a warning which had been given was adequate.

The *Antcliff* Court noted that once a manufacturer of a proprietary product undertakes to direct or recommend the manner in which the product should be used it is then held to the duty of exercising reasonable care in giving such direction. 414 Mich at 636. *Smith* deals with a duty to warn which arises under two distinct rules, neither of which apply in this case.

In *Hill v Husky Briquetting, Inc.*, 54 Mich App 17; 220 NW2d 137 (1974) cited by Petitioner, the sole question addressed by the Court of Appeals was

> Where a manufacturer of a product undertakes to explain or give warnings on the label concerning the use or propensities of its product and the explanation or warning is stipulated to be "the average standard in the industry", has the manufacturer, as a matter of law, discharged its assumed duty to make a statement which is adequate under all the facts and circumstances? 54 Mich App at 21

This is not the issue in the case at bar. In *Hill* the Court found the manufacturer assumed duty. The present case addresses the issue of whether there is a duty to warn at all. That issue was not addressed in *Hill*. Rather, the Court's analysis hinged upon whether a manufacturer had given an adequate warning where it had already undertaken to give such warnings.

Therefore, *Fisher v Johnson Milk Co., Inc., supra,* and *Antcliff v State Employees Credit Union, supra,* are controlling on the issue of whether there is a duty to warn when there is a simple tool or product with a known and obvious danger.

It is well-settled law that the question of duty is to be resolved by the court rather than the jury. *Pettis v Nalco Chemical Co.*, 150 Mich App at 302, citing *Antcliff v State Employees Credit Union*, 414 Mich App 64. With this understanding, it is clear the court acted properly in granting the Motion for Summary Judgment.

B. RESPONDENT LAKESHORE PRODUCTS, INC., AS A COMPONENT SUPPLIER OF A SIMPLE PRODUCT, NOT DANGEROUS OR DEFECTIVE IN ITSELF, HAD NO DUTY TO WARN PETITIONER OF POTENTIAL DANGERS AS A RESULT OF USING A FINISHED PRODUCT WHICH INCORPORATED THE COMPONENT.

Respondent, Lakeshore Products, Inc., was the manufacturer of wooden deck sections that were later incorporated by Respondent Park Shore Marina into the finished dock. As a component supplier, Respondent Lakeshore Products, Inc., simply manufactured the wooden deck sections to Respondent Park Shore's specifications, but had no knowledge as to where the placement of the finished dock, or the depth of the water. Petitioner seeks to hold Respondent Lakeshore Products, Inc., liable for its manufacture of wooden deck sections, not defective or dangerous by themselves, because of its failure to warn Petitioner of potential dangers in using the finished dock. The Petitioner goes too far in attempting to extend liability to Respondent Lakeshore Products, Inc.

Petitioner furthermore misstates or confuses the nature of the product involved. Respondent Lakeshore Products, Inc. did not manufacture or supply "an 80 foot

long dock that ends in shallow water". (petitioner Herbert H. Johnson, Jr.'s Brief on Appeal, STATEMENT OF ISSUES I and II at p 2 in the Brief on Appeal to the Sixth Circuit Court of Appeals) The Petition for Writ of Certiorari makes the same assumption, without openly stating so.

The "product" of Lakeshore Products, Inc. was not a wooden dock, but simply wooden deck sections. As the fabricator of the wooden deck sections, Respondent Lakeshore Products, Inc. did not manufacture a dock which ended in shallow water; in fact the facts clearly show that Lakeshore Products, Inc. had no knowledge of the depth of the water into which the dock would be placed.

The Michigan Court of Appeals in *Jordan v Whiting Corporation*, 49 Mich App 481; 212 NW2d 324 (1973); affirmed 396 Mich 145; 240 NW2d 468 (1976) addressed the duty of component manufacturers to warn of potential dangers of the finished product.

In *Jordan* the plaintiff's decedent attempted to place liability on a component manufacturer of a portion of a crane which electrocuted the decedent. Whiting Corporation manufactured components which were ordered and bought from it by another defendant. The component parts by themselves were not dangerous or defective. The Court held as follows with regard to the component manufacturer's obligation:

> The obligation that generates the duty to avoid injury to another which is reasonably foreseeable does not – at least yet – extend to the anticipation of how manufactured components not in and of themselves dangerous or defective can be potentially dangerous dependent upon

> the nature of their integration into the unit designed, assembled, installed and sold by another. *Jordan*, 49 Mich App at 481.

The *Jordan* case states that the component manufacturer of a part not in and of itself dangerous or defective has no duty to avoid injury to another using the finished part.

Jordan is applicable to the present situation in that Respondent Lakeshore Products, Inc., as a component manufacturer of the wooden deck sections, not in and of themselves dangerous or defective, had no duty to warn Petitioner of potential dangers in using the finished dock. The extension of liability to Lakeshore Products, Inc. is unreasonable in light of the *Jordan* case.

The Michigan Supreme Court in *Antcliff v State Employees Credit Union* addressed a similar issue. The product in *Antcliff* was a scaffold manufactured by Spider Staging Sales Co., Inc., but was incorporated into a support system and rigging by the plaintiff. The Michigan Supreme Court in affirming a finding of the Court of Appeals that there was no duty to warn or give directions for safe rigging, stated:

> In the instant case, Spider manufactured the scaffold which happened to be involved in a construction site accident. The scaffold was not found by the jury to be defective. The most that can be said of the accident is that the load-bearing capacity of the rigging system designed by plaintiff Howard Antcliff and his co-worker was insufficient to support the powered scaffold. This lead to the system's collapse. We are unable to conclude that the scaffold's weight was a dangerous propensity which nessitates vindication of the policy. In addition, plaintiff

> Howard Antcliff and his co-worker were both journeyman painters. In view of their knowledge and experience as riggers, we feel constrained to charge them with full appreciation of the danger of inadequately supporting the scaffold on which they worked. As a result, **the circumstances here (a non-defective product lacking in dangerous propensities and a known or obvious product-connected danger) do not support application of the policy which would require Spider to provide instructions for the safe rigging of its product.**
>
> Moreover, the contrary conclusion would lead to demonstrably unfair and unintended results. There are countless skilled operations such as the rigging of scaffolding, which involve otherwise nondangerous products in potentially dangerous situations. A manufacturer of such a product should be able to presume mastery of the basic operation. The more so when, as here, the manufacturer affirmatively and successfully limits the market of its product to professionals. In such a case, the manufacturer should not be burdened with the often difficult task of providing instructions on how to properly perform the basic operation. 414 Mich at 639-640.

The same principles apply by analogy in this case. There is not even an allegation that the wooden deck section was in some manner defective apart from the alleged failure to warn. Respondent Lakeshore Products, Inc. supplied 99% of its products to wholesalers, in this particular instance, the Respondent Park Shore Marina. As noted above, Respondent Lakeshore Products, Inc. had no knowledge of the lake upon which this deck was to be installed or the depth of the water over which it was to be used. It supplied its product, a wooden deck, to a professional which had been to the specific location on several

occasions, having initially installed the wooden deck section in 1984. Where a professional incorporates a simple product into a completed assembly, the manufacturer of the component should not be required to provide warnings.

In *Bullock v Gulf and Western Manufacturing*, 128 Mich App 316; 340 NW2d 294 (1983) it was alleged that a safety device was missing on a press. The Court of Appeals affirmed a directed verdict in favor of the press manufacturer. In affirming the dismissal of plaintiff's claim that there was a defect in the product, the court noted that the component punch press was, by itself harmless until it was assembled with a die. In the same manner, in the case at bar, the deck section itself in this case was harmless, and if it became unsafe at all, it only became so upon installation by someone into shallow water. It should be noted at this point that it is the testimony of Respondent Lakeshore Products, Inc. that 99% of its sales are to wholesalers, that is to marinas and not to private individuals.

An additional point raised in *Bullock* is that where the specific dangers are fully known, there is no duty to warn. In this instance, it is the testimony of both Park Shore Marina and the Andersons that they were aware of the dangers of diving into shallow water.

Petitioner's reliance on *Horen v Coleco Industries, Inc.*, 169 Mich App 725; ___ NW2d ___ (1988) is misplaced which can clearly be seen by comparing the simple deck section in this case with the "product" in *Horen*:

> On July 3, 1981, while visiting the home of his parents-in-law, Mr. and Mrs. Ralph Cox, 33 year-

> old William Horen began swimming in the Cox's above-ground outdoor swimming pool which had been manufactured in 1978 by Defendant Coleco, Industries, Inc. **The pool,** measuring 24 feet in diameter, **contained a water depth of between four and five feet and was surrounded by side walls to which a large, manufacturer-supplied deck** had been attached. (Emphasis added) 169 Mich App at 727.

The court also noted that there was a small faded, peeling warning label on the chain-link wall adjoining the deck.

Coleco Industries supplied the pool itself, and also supplied an attached deck. It would have known when it supplied the attached deck that the depth of the water would be four to five feet into which a dive would take place.

Furthermore, the Michigan Court of Appeals in *Horen* misunderstood the application of *Owens v. Allis Chalmers Corporation, supra*. This is evident as nowhere in Horen did the Court address the above cited analysis in *Antcliff v State Employee Credit Union*, nor did it address the analysis performed by the Michigan Supreme Court of the simple tool doctrine in the case which it did cite, *Michigan Mutual Insurance Co. vs Heatilator Fireplace*, 422 Mich 148; 366 NW2d 202 (1985). Again, both *Antcliff* and *Michigan Mutual Insurance Co.* are post *Owens* cases and both involve the analysis of a product to determine whether it was a simple tool in determining whether there is a duty to warn.

Failure to understand the decision of the Supreme Court in *Owens* and *Antcliff* explains the apparent inconsistency between *Horen* and *Hensley v The Muskin Corporation*, 65 Mich App 662; 238 NW2d 342 (1975). The plaintiff

in *Hensley* dove from a seven foot high garage roof into a four foot deep swimming pool. The plaintiff alleged that defendants had a duty to warn that a person should not dive into the pool. Citing *Fisher v Johnson Milk Co., supra,* the Court of Appeals held in *Hensley*:

> Neither the manufacturer, the seller nor the brother-in-law were under any duty to warn this plaintiff of an obviously dangerous use of an otherwise non-dangerous product. 65 Mich App at 663.

The *Horen* finding is premised upon its belief that *Hensley* was no longer valid since it viewed *Owens* as having imposed a duty to warn in all cases. Further, in *Horen* the Court discussed whether the question of duty was one of law for the court or whether it was for the jury to decide. There is an alternate explanation for the *Horen* court allowing the issue to go to the jury.

As noted above, in both *Antcliff v State Employees Credit Union,* and in *Smith v E. R. Squibb,* the Michigan courts have held that where a manufacturer assumes a duty to warn, it must do so in a reasonable manner. The appellate decision in *Horen* specifically noted the presence of " . . . only one small, faded and peeling warning label", which plaintiff denied seeing. 169 Mich App at 727. The *Horen* court could easily have found the issue to be one for jury determination by reasoning that whether the attempted warning was exercising "reasonable care commensurate with the dangers involved in giving such directions" was for a jury determination.

The product in *Horen* is distinguishable from the present case. *Horen* addressed the pool **and** its attached, manufacturer-supplied deck as a single product. As such,

the depth of the water was within the control of the manufacturer. This is an important distinction, as Respondent Lakeshore Products, Inc. had no such knowledge or control:

> I cannot find that the dock manufacturers have a duty to warn because they have no control over, nor any responsibility for the depth of the water on which the products are placed. (R. 119: Federal District Court Opinion, at p 12, footnote omitted)

ARGUMENT

II

AN ALLEGED FAILURE TO WARN OF THE DANGER OF DIVING INTO SHALLOW WATER WAS NOT THE PROXIMATE CAUSE OF PETITIONER'S INJURY, WHERE THERE WAS NO DEFECT IN THE PRODUCT.

The Michigan Supreme Court has held that "the question of proximate cause, like the question of duty, is 'essentially a problem of law' ". *Moning v Alfono*, 400 Mich 424, 440; 254 NW2d 759 (1977) Petitioner in this case simply did not show that anything which Respondent Lakeshore Products, Inc. did contributed to or caused his injuries in any fashion.

In its analysis, the Federal District Court correctly determined that in all the cases cited by Petitioner there was something about the product which proximately caused the Petitioner's injuries. (R. 119: Opinion of Federal District Court at p 8).

In *Pettis v Nalco Chemical Co., supra,* the explosion was caused because the product exploded when it came into contact with hot molten steel.

The District Court also cited *Thomas v International Harvestor Co.*, 57 Mich App 79; 225 NW2d 175 (1974). In that case injury occurred when a bearing manufactured of brittle steel chipped and flew into the plaintiff's eye. Again, in that case, it was some property of the product itself, brittleness, which caused the injury.

In the present case, Petitioner is unable to identify any property of the wooden deck section which was in itself defective or which caused Petitioner's injury.

Petitioner misunderstood, and misconstrued the Federal District Court's statement that Petitioner could as easily have been injured by diving from a cliff or a dune. In doing so, the Federal District Court properly noted that no characteristic of the deck caused Petitioner's injury. The breach of duty in this instance was the failure of the property owner to warn of the shallowness of the lake, not the duty of a component supplier to warn of a non-existent defect in its product. As Judge Enslen found in his Opinion, Petitioner has an action against the owners of the property pending in the Illinois State Court. (R. 119: Opinion of Federal District Court at p 2) See also Title Page of transcript of deposition of Herbert H. Johnson, Jr. of November 17, 1986, identified in Petitioner's Addendum Designation of Appendix Contents.

Petitioner cited the *Moning* case for the proposition that a jury must be allowed to consider what is reasonable conduct for the manufacturers and installers of docks in light of their knowledge of the serious injuries

which can result from the foreseeable use of their products. (Petitioner's brief at p 17-18). However, the *Moning* case states that:

> "(t)he balancing of the magnitude of risk in the utility of the actor's conduct requires a consideration by the court and jury of the societal interest involved. The issue of negligence may be removed from jury consideration if the court concludes that overriding considerations of public policy require that a particular view be adopted and applied in all cases." *Moning*, 400 Mich at 425.

The District Court in its Opinion made just such a finding:

> (F)inding a duty to warn here would be like finding that an asphalt manufacturer had the duty to warn automobile accident victims that being thrown onto asphalt paving after a car accident, would cause them to injure themselves. Assuming that the paving was properly done, the fact that the street is paved has little if any connection to the injuries caused by automobile accidents. (Opinion of the Federal District Court at p 15)

Another analogy to the present case is the situation where the manufacturer of brake pads on an automobile has no duty to warn of dangers involved with driving a vehicle. In this case, Petitioner is attempting to extend liability too far by placing a duty to warn on a component manufacturer of a product not dangerous or defective in itself for potential dangers of a finished product.

Petitioner also appears to argue that the issue of proximate cause is one of fact which at all times must be decided by a jury, as opposed to a decision of law for the

Court. First, this legal contention is inaccurate, as noted from the above-cited language from *Moning v Alfono*. Second, Petitioner chose not to argue this issue before the Federal District Court, and cannot now be heard to raise this issue for the first time upon appeal.

ARGUMENT

III

PETITIONER HAS FAILED TO ESTABLISH ANY SUBSTANTIAL QUESTION MERITING REVIEW BY THE UNITED STATES SUPREME COURT.

Rule 17 of the United States Supreme Court provides guidelines to litigants of the standards which the Court will use in reviewing Petition for Writs of Certiorari. Petitioner has failed to establish any substantial federal question meriting or requiring review by this Court.

Petitioner has failed to allege the involvement of a federal question for the simple reason that none exists. This case was filed in the United States District Court on the basis of its diversity jurisdiction, and revolves entirely around issues of Michigan substantive law. There were not at the time of filing, just as there are not now, federal questions requiring decision by the United States Supreme Court.

There are no constitutional issues framed in this case. Neither has Petitioner established that there is a conflict among the Federal Circuit Courts of Appeal.

This case is a routine personal injury case which was fully and fairly heard in the United States District Court on the basis of its diversity of citizenship jurisdiction.

Petitioner had a full and fair review of these issues by the Sixth Circuit Court of Appeals. Petitioner has failed to establish any basis to justify a review by the United States Supreme Court.

CONCLUSION

Under Michigan law, Respondent Lakeshore Products, Inc. had no duty to warn under the factual circumstances of this case. Furthermore, Petitioner has failed to establish any facts which would allow a finding that failure to warn was a proximate cause of Petitioner's injuries. Petitioner has further failed to establish a substantial federal question meriting review by the United States Supreme Court.

Therefore, Respondent Lakeshore Products, Inc. prays that this Court deny the Petition for Writ of Certiorari, and award to it such costs, fees and damages as may be merited in the case.

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